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In The
Supreme Court of the United States

October Term, 1982

GREITZER & LOCKS, GENE LOCKS and
MARTIN GREITZER; NEIL R. PETERSON,
Petitioners,

v.

JOHNS-MANVILLE CORPORATION and
JOHNS-MANVILLE SALES CORPORATION;
RAYBESTOS-MANHATTEN, INC.;
EAGLE-PICHER INDUSTRIES, INC.;
UNARCO INDUSTRIES, INC.;
FIBREBOARD CORPORATION;
H.K. PORTER COMPANY;
SOUTHERN TEXTILE CORPORATION;
THE CELOTEX CORPORATION;
KEENE CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I.

Is an Order granting a Motion to Disqualify Counsel appealable as a final decision in a collateral matter pursuant to 28 U.S.C. Section 1291 under the "Collateral Order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)?

II

Does a nonclient of a former United States Department of Justice trial attorney who possesses no confidences of the non-client or co-defendants and who never had any community of any litigative or other interests with the non-client have standing to contest the employment by a private law firm of that former government attorney under a motion to disqualify the private firm where the government has "waived" any imputed disqualification?

III.

Should not this Court, as an important matter of first impression, approve in principle the use of a "screening" mechanism as approved in Formal Opinion 342 of the American Bar Association so as to prevent the automatic disqualification of a law firm which has employed a former United States Department of Justice trial attorney?

IV.

As a function of its supervisory power over the lower courts, should not this court articulate standards for the imputed disqualification of eminently competent (experienced legal) counsel of choice to preclude disqualifying such counsel on appearance of impropriety grounds alone where no actual impropriety, taint or unfairness can be demonstrated, and prejudice will plainly result to the clients of the disqualified attorney.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Greitzer & Locks, Gene Locks, Martin Greitzer and Neil R. Peterson, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on June 17, 1982.

I. OPINIONS BELOW

The Court of Appeals for the Fourth Circuit, sitting en banc, affirmed by an equally divided court, without opinion, the judgment of the District Court. The order is not yet reported and is set forth at Appendix A herein. The majority Opinion of the three judge panel of the Court of Appeals for the Fourth Circuit, reversing the district court, is not reported and is set forth at Appendix B herein. The Opinion of the United States District Court for the Eastern District of Virginia is not reported and is set forth at Appendix C herein.

II. JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered June 17, 1982. This Petition is filed within ninety (90) days. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

III. QUESTIONS PRESENTED

1. Is an Order granting a Motion to Disqualify Counsel appealable as a final decision in a collateral matter pursuant to 28 U.S.C. Section 1291 under the "Collateral Order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)?

2. Does a non-client of a former United States Department of Justice trial attorney who possesses no

confidences of the non-client or co-defendants and who never had any community of any litigation or other interests with the non-client have standing to contest the employment by a private law firm of that former government attorney under a motion to disqualify the private firm where the government has "waived" any imputed disqualification?

3. Should not this Court, as an important matter of first impression, approve in principle the use of a "screening" mechanism as approved in Formal Opinion 342 of the American Bar Association so as to prevent the automatic disqualification of a law firm which has employed a former United States Department of Justice trial attorney?

4. As a function of its supervisory power over the lower courts, should not this Court articulate standards for the imputed disqualification of eminently competent (experienced legal) counsel of choice to preclude disqualifying such counsel on appearance of impropriety grounds alone where no actual impropriety, taint or unfairness can be demonstrated, and prejudice will plainly result to the clients of the disqualified attorney.

IV. REGULATIONS INVOLVED

This case involves the Code of Professional Responsibility of the American Bar Association Canons 4, 5 and 9 and Disciplinary Rules 5-105(A), 5-105(D) and 9-101(B). See Appendix F. at A-108, A-109.

V. STATEMENT OF THE CASE

This Petition presents yet another disqualification matter to this Court, but one with significant differences, for never before has this Court been presented with a situation in which:

1. A Department of Justice formal waiver of imputed

disqualification of a law firm (expressly sanctioned under existing Ethical Codes by ABA Formal Opinion 342 and expressly approved for future use by Rule 1.11, Kutak Commission Report*) has been overridden by a court;

2. An imputed disqualification has been ordered based upon presumed and unproved confidences of a non-client;

3. A lawyer has not effectively switched sides in relation to the movant; and

4. There is no evidence, let alone concrete evidence, that there is any trial prejudice or taint, as those criteria were articulated by this Court in *Firestone* v. *Risjord*, 449 U.S. 368, 66 L. Ed. 2d 577, 101 S. Ct. 669 (1981).

The end result of this conjoining of circumstances is that 260 injured victims of asbestos disease (not corporate clients with great financial reserves as is usual in this type of case) are deprived of highly competent trial counsel of their free choice without any palpable reason therefor, all to their demonstrated prejudice.

During the summer of 1976, a number of Tidewater, Virginia asbestos workers and their families sought the services of Gene Locks, a partner and seasoned and highly competent trial lawyer in the Philadelphia law firm of Greitzer & Locks, to pursue their claims for asbestos-related injuries and deaths against several asbestos manufacturers. Mr. Locks was experienced in workmen's compensation claims and products liability litigation and came highly recommended by his Philadelphia shipyard clients. Locks, who came to represent over 260 Tidewater clients, initially associated two (2) young local attorneys to assist him, one in Norfolk and one in Newport News. Record at 68, 85, 86.** Throughout extensive discovery in the pre-trial period and during the trial of the first five cases,[1] Locks managed the

* Appendix N at A-155 et seq.

** Record (R.) refers to Appendix filed in the United States Court of Appeals for the Fourth Circuit.

[1]The first trial, *Dishner* v. *Johns-Manville*, resulted in a verdict of $795,000. The second trial, involving four plaintiffs, *Oman, et al* v. *Johns-Manville et al.*, resulted in verdicts of $435,000 for each of four plaintiffs, totaling of $1,720,000.

medical, the expert scientific and the product defect aspects of the cases, conducting nationwide discovery and becoming recognized in a number of states as one of the nation's foremost asbestos plaintiff's attorneys. Record at 77 - 86. He and his local co-counsel, whose primary function was to work up individual cases, were pitted against nearly all of the major defense firms in eastern Virginia, representing every major manufacturer.

The asbestos manufacturers had, in the meantime, sued over against the United States government as a third party defendant on a number of negligence theories.[2] The Justice Department coordinated the government's defense, its primary client agency being the United States Navy. Although the United States was named as a third party defendant in some 233 cases, it has never paid one dollar in settlement and it won the one case ever tried against it on the merits. In fact, the Court of Appeals for the Fourth Circuit, when its panel reversed the order of disqualification, had already removed the issue of the government's liability for negligence. See *Glover* v. *Johns-Manville Corp.* 662 F.2d 225 (th Cir. 1981); *White* v. *Johns-Manville Corp.* 662 F.2d 234 (4th Cir. 1981); *White* v. *Johns-Manville Corp.* 662 F.2d 243 (4th Cir. 1981). In upholding the District Court's determination that there was no negligence on the part of the government, the Fourth Circuit virtually eliminated the United States' participation in these actions. This is further illustrated by the manufacturers' voluntary dismissal of the United States as a party in 137 cases pending in Newport News in June 1982, and in the several Norfolk cases then set for trial.

[2] The plaintiffs filed actions directly against the United States in only 19 cases, and those solely for protectionary purposes under a court mandate. All direct actions against the United States in which petitioners were counsel of record were initially stayed and have been subsequently dismissed.

In October of 1980, Neil Peterson, a former Justice Department attorney who had represented the United States in Virginia asbestos litigation and who had successfully defended the United States *against* the asbestos manufacturers, was hired by Greitzer & Locks as an associate to help with the firm's growing caseload in Pennsylvania and elsewhere *outside* Virginia. It was always fully and firmly understood by the firm, Peterson and the Justice Department that Peterson would not be involved in the Virginia cases. Following its routine procedures in similar situations, the Justice Department in August, 1980, at Peterson's request, had begun initiating the procedures for a waiver of imputed disqualification to allow the other firm members (particularly Gene Locks) to remain in the Virginia litigation. Pursuant to an informal understanding among all involved parties prior to Peterson's association with the firm, the firm instituted screening measures whereby Peterson would have no access to Virginia files, would not participate in the Virginia cases or in any discussion regarding them, and would not share in any fees derived from those cases. App. C at A-45, A-46. Although the Justice Department had not issued a formal waiver, the Civil Division for which Peterson had worked, in consultation with the Office of Legal Counsel, approved the arrangement as there was clearly no reason to do otherwise.

In November of 1980, twelve (12) of the manufacturers filed a motion to disqualify Greitzer & Locks from Virginia asbestos litigation, based solely on an affidavit filed by Johns-Manville's counsel, C. Michael Montgomery. The affidavit was subsequently withdrawn at Mr. Montgomery's request. Prior to the first hearing on the motion, three of the manufacturers withdrew their support. Several manufacturers, including Owens-Corning Fiberglass, Nicolet, Amatex and Forty-Eight Insulations, never joined in the motion (the primary mover, Johns-Manville Corporation, has recently invoked Chapter 11 of the Bankruptcy Code).

In January, 1981, after receiving confirmation from all of its client agencies involved, the Justice Department

issued a formal waiver of imputed disqualification as to Greitzer & Locks, and filed it in the United States District Court at Norfolk in the pending disqualification proceedings. App. J at A-138 et seq.

During the evidentiary hearing held in February, 1981 [the Court allocated one-half (½) day], the manufacturers presented no evidence whatsoever of any attorney-client relationship between themselves and Peterson, or of any secrets or confidences held by Peterson; nor was there any evidence of a breach of the screen, nor even a suggestion, let alone a concrete showing, of any taint that would accrue to the future trial proceedings. At best, the manufacturers offered irrelevant trivia which a majority of the Court of Appeals panel found to be unworthy of consideration, but which found favor with District Judges who were plainly affronted that the employment of Peterson was not sooner discussed with them. (See App. C at 96.) Thus, the District Court issued an order on April 6, 1981, disqualifying Greitzer & Locks from *all* Virginia asbestos cases, including those in which the United States was *not* a party. Subsequent to the filing of a notice of appeal, the District Court amended its order, limiting the disqualification to those cases in which the United States was a party, but admonishing local co-counsel for the plaintiffs of the hazards of continuing their association with the firm in the remaining cases.

Following extensive briefing and oral argument, on March 5, 1982, the District Court's disqualification of Greitzer & Locks was reversed as to actions against the manufacturers and vacated as to those 19 actions directly against the United States[3] by the majority of a three Judge Panel of the Court of Appeals for the Fourth Circuit.[4]

[3]These actions had been dismissed while the case was on appeal.

[4]By this time, a state court in Illinois had also denied a manufacturer motion objecting to the admission of Gene Locks pro hac vice. The motion had been brought by three(3) of the same manufacturers on identical grounds.at App. G at A-110 et seq.

All asbestos actions pending in the Eastern District of Virginia had been stayed from December, 1979, pending the determination of various issues affecting that litigation by the Fourth Circuit. Retrial of the *Oman* case (tried by Gene Locks and co-counsel in November and December, *1979*, and resulting in a $1,720,000 jury verdict set aside by the trial judge and reversed and remanded by the Fourth Circuit, cert. denied) had been set for April 13, 1982, with other cases scheduled thereafter.

Only five (5) of the original moving manufacturers filed a Petition for Rehearing and Suggestion for Rehearing en Banc, which was granted on April 23, 1982. Appellants and all four plaintiffs in the *Oman* case applied to the Appeals Court for a stay of the trial proceedings until June 14, 1982. The manufacturers filed no objection and the stay was immediately granted by the Fourth Circuit, effectively halting all asbestos trial proceedings in the Eastern District of Virginia.

Oral argument was held before the Fourth Circuit Court of Appeals, sitting en banc on June 6, 1982. The Court, unable to reach a majority, issued an order on June 17, 1982, affirming the District Court's disqualification order by an *evenly divided* Court, with no opinion.

With the *Oman* case set for July 23, 1982, Appellants applied to the Fourth Circuit for a Stay of the Mandate and a Stay of the Trial Proceedings. Only one (1) defendant objected to a stay of the litigation. Three (3) weeks after the applications were filed, on the Friday preceding the scheduled trial date, Appellants' Applications for Stays were denied, again by an evenly divided Court.

On retrial of the *Oman* case during July and August, 1982, conducted by local counsel without Gene Locks, the

jury returned four verdicts aggregating $829,000.00, barely more than half of the verdicts returned two and one-half (2½) years previously with far less liberal evidentiary rulings and when the plaintiffs' diseases had not progressed as much as at retrial. As we note below, the oft criticized tactic of a disqualification motion succeeded admirably here, with devastating trial prejudice to the innocent plaintiffs, to the delight of manufacturers and the embarrassment of the judicial system.

VI. REASONS FOR GRANTING THE WRIT

I.

AN ORDER GRANTING A MOTION TO DISQUALIFY COUNSEL IS APPEALABLE AS A FINAL DECISION IN A COLLATERAL MATTER UNDER THE COHEN DOCTRINE.

A. *Effect of Firestone on Appealability of Orders Granting Disqualification*

Prior to *Firestone* v. *Risjord*, 449 U.S. 368, 66 L. Ed. 2d 577, 101 S. Ct. 669 (1981), it was well settled that orders granting disqualification are appealable. See Appendix D. Adhering to its commitment to the doctrine of judicial restraint, this Court beclouded the issue somewhat in its famous *Firestone* footnote number 8:

> The Court of Appeals also stated that orders granting motions to disqualify counsel would be appealable under §1291. 612 F. 2d, at 378. *That question is not presented by the instant petition, and we express no opinion on it.* . . (emphasis supplied)

The case at bar presents to this Court the opportunity to lift the cloud which its footnoted reservation placed over the issue of appealability of orders granting disqualification. It had seemed plain that such orders meet the requirements of the *Cohen* doctrine. However, a pronouncement of this Court to that effect is now more than ever needed, because of the footnoted caveat in *Firestone*.[5]

B. *The Cohen Criteria Are Satisfied*

In *Firestone*, this Court articulated the criteria which must be met for an order of the district court to be appealable immediately under 28 U.S.C. §1291 without awaiting resolution of the entire case. Speaking of the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949), this Court said:

> We held that the Court of Appeals properly assumed jurisdiction of the appeal pursuant to §1291 because the District Court's order constituted a final determination of a claim "separable from, and collateral to," the merits of the main proceeding, because it was "too important to be denied review," and because it was "too independent of the cause itself to require that

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[5]Of course, depending upon this Court's view of its holding in *Firestone*, it may not even be necessary to accept certiorari to reinstate counsel. Thus, if, in holding denials of disqualification unappealable in the ordinary course in the sense that there should be no review (used broadly) of a denial, absent exigent circumstances to be demonstrated in an interlocutory appeal [28 U.S.C. 1292 (b)] or mandamus petition (28 U.S.C. 1651), then this Court could dispose of the matter by holding that, under such circumstances, the Court of Appeals should not have heard the matter en banc, and by vacating its decision and reinstating that of the panel. In this context, a petition for rehearing en banc would be viewed as an appeal. See *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.*, 345 U.S. 247, 258, 259, 97 L. Ed. 986, 73 S. Ct. 656 (1953).

> appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546. *Cohen* did not establish new law; rather it continued a tradition of giving §1291 a "practical rather than a technical contruction." [Citations omitted.] We have recently defined this limited class of final "collateral orders" in these terms: "[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of an action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay, supra,* [439 U.S. 463, 468, 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978)], at 468 (footnote omitted). See *Abney* v. *United States,* 431 U.S. 651, 658, 52 L. Ed. 2d 651, 97 S. Ct. 2034 (1977).

Firestone v. *Risjord,* 449 U.S. at 374, 375.

Clearly, an order granting disqualification meets the first test, with even more reason then the denial of disqualification which was held to be a final determination in *Firestone*. 449 U.S. at 375. While Chief Justice Berger and Justice Rehnquist would not have held a denial of disqualification final because it was always subject to reconsideration in the district court,[6] the same cannot be said of an order *granting* disqualification. Looking at "practical" effects, the granting of disqualification certainly achieves with finality all of the harms to be avoided by an erroneous order. The granting of disqualification irretrievably

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[6] Looking at "practicality", who is to seek reconsideration of a disqualification -- the client pro se; the 'new' attorney who would be cast in the position of arguing that another (disqualified) attorney was somehow better or more competent or more needed that he, assuming the client can afford a 'new' attorney; the disqualified attorney who may no longer practice in the case. Obviously, the disqualified attorney is the proper party to seek reconsideration or appeal, notwithstanding the disadvantages under which he labors.

rends apart the attorney-client relationship, a relationship historically accorded significant protection and even indulgence in this country. It sullies without recourse the reputations of an attorney who assertedly "switched sides" and the firm which hired him, if the order is not appealable. It leaves the client bereft of his highly competent and specialized counsel of choice in an age where specialization and competence are much sought by both clients and the judiciary. It leaves the client presumptively prejudiced in each case, a prejudice which is manifest on the record of this case, where, upon a new trial, clients recovered barely one half as much damages as when they were represented by disqualified counsel. Disqualification here also undoes all the salutary effects of the government's waiver program, which enables it to attract hopefully the finest of young legal talent through allaying their justified concerns at job mobility. These concerns affect not only all young government attorneys but law clerks in both the judicial and, before graduation in the executive branches. Finally, the injury to the public perception of justice is complete when corporate defendants with billions of dollars in assets can win such a campaign of dubious "tactics" against those inncocent and unfortunate victims, the asbestos plaintiffs, whose health and very lives have once already been sacrificed on the altar of Mammon. Such evils call aloud for immediate correction and remedy. Plainly, by any "practical" analysis, an order granting disqualification is a final determination.

The second criterion actually involves two tests: first, that there be an important issue, and second, that the issue be completely separate from the merits of the action. This Court assumed this criterion was met in *Firestone*. 449 U.S. at 376. Separability has traditionally been judged from the

perspective of whether the issue involved is "enmeshed in the factual and legal issues comprising the cause of action." *Coopers*, 437 U.S. at 469. Here, the disqualification had nothing to do with either the facts or the theories upon which the underlying negligence/product liability cause of action was based. Plainly, disqualification here involved an issue wholly separate from the merits.

The importance of the issue is manifest:

1. The importance attached to what a former government attorney can and cannot do in private practice as reflected by congressional enactment in 18 U.S.C. §§207, 208, and Executive regulation in 28 C.F.R. 45.

2. The importance which the American Bar Association attached to the interpretation of its own Code of Professional Responsibility in its Formal Opinion 342 and to a proposed revision of that Code (Kutak Commission Report, Section 1.11) to amend the applicable provisions to prevent prophylactic disqualifications, as here, without any evidence of wrongdoing or showing of taint to judicial proceedings.

3. The fact that all courts considering the matter have permitted immediate appeals to prevent the type of abuse which occurred here.[7]

4. The fact that the government, unrepresented here, but a participant in the underlying litigation has a significant interest expressed both by itself to this Court[8] and by several former high ranking Department of Justice officials,

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[7]This Court was presumably influenced to some extent by the fact that six of eleven circuits did not allow appeals of denials of disqualification, three of those circuits having recently reversed prior decisions permitting appeals. *Firestone*, 449 U.S. at 373, n. 10 and associated text.

[8]The Department of Justice has followed the waiver approach recommended by the ABA. When it appears that a former Department attorney is adequately screened from participation in a case and will not share in fees attributable to it, and if there is no other significant appearance of impropriety in the particular instance, the Department has consented to the former Department attorney's law firm's participation in the case.

Brief of the United States in opposition [to Petition for Certiorari], *Kitchin* v. *United States*, Oct. Term, 1978, No. 78-1923, p. 8.

in the integrity and viability of its waiver process.[9]

5. The importance, absent supervening reason, attached to a litigant's right to be represented by competent counsel of his choice.

6. The frequency with which, in the absence of meaningful standards, the courts of appeals have to address one phase or another of ethical problems with widely discrepant results.

7. The importance of the public's view of a judicial system's processes which permits the Code of Professional Responsibility to be a plaything in a game of tactics without effective timely review.

It cannot be gainsaid that this issue is important, indeed, that it is crucial to the lifeblood of the legal profession and to the public's perception of it and the judicial system.

The third criterion, that the order be "effectively unreviewable", is also met here. It is significant that the denial of disqualification which was held not to comport with the criterion in *Firestone* was a showing based upon conjecture, supposition and "possibility", not one which would "supply a single concrete example of the indelible stamp or taint" to the judicial proceedings involved. 449 U.S. at 376.

On the other hand, the unavoidable harm of a grant of disqualification is vitally present, immediate and, in large part, irreparable if it is not reviewable without delay. As the Second Circuit succinctly said in distinguishing from denials

[9]See *Armstrong* v. *McAlpin*, 625 F.2d 433 (2d Cir. 1980), wherein on consideration en banc, former Solicitor General Erwin N. Griswold and twenty-four (24) former Attorneys General, Legal Counsel, Assistant Attorneys General, United States Attorneys and others filed a brief as amici curiae in support of screening mechanisms and the waiver process.

of disqualification:

> We do not reach the same conclusion, however, with respect to orders granting disqualification motions. In such cases, the losing party is immediately separated from counsel of his choice. If the order is erroneous, correcting it by an appeal at the end of the case might well require a party to show that he lost the case because he was improperly forced to change counsel. This would appear to be an almost insurmountable burden. In addition, permitting an immediate appeal from the grant of a disqualification motion does not disrupt the litigation, since the trial must be stayed in any case while new counsel is obtained. Moreover, the grant of a disqualification motion may effectively terminate the litigation if the party whose counsel is disqualified cannot afford to hire new counsel to begin the litigation anew. Such considerations are obviously pertinent, for example, in this case. See notes 2-3 and accompanying text, *supra*. Furthermore, the granting of a disqualification motion will raise a substantial question. Thus, it is far less likely that appeals from orders granting disqualifications motions will be taken purely for tactical reasons. Finally, disqualification often impairs the reputation of the disqualified firm or attorney, as this injury may never be corrected on appeal if the party is satisfied with the performance of his new counsel. For all these reasons, we now agree with then Chief Justice Clark's view, expressed well before *Silver Chrysler*, [496 F. 2d

800 (2d Cir. 1974)], that grants of disqualification motions are more important and potentially more harmful than denials of such motions and should therefore be immediately appealable as a matter of right. See *Fleischer* v. *Phillips*, *supra*, 264 F. 2d 515, 517 (2d Cir. 1959), cert. denied, 359 U.S. 1002, 3 L. Ed. 2d 1030, 79 S. Ct. 1139 (1959).

Armstrong v. *McAlpin*, 625 F.2d, at 440-441. Accord: *Duncan* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d, 1020, 1027 (5th Cir. 1981).

In addition, there is here an interest beyond that specifically addressed in the cited portion of *Armstrong* or in *Duncan* -- that of the United States. We address the merits as to that interest below (See Section III), but here note that the United States will have *no* means to remedy the decision below or to uphold its fully informed waiver processes and decision, since it has no entitlement whatsoever to appeal a judgment in a case between a plaintiff, whose counsel has been disqualified after receiving a waiver from the Department of Justice, and an asbestos manufacturer. This is especially serious because this is the first instance where one of its waivers has been rejected by a court.

Thus, the United States', the clients' and the attorneys' interests are all irretrievably prejudiced if the granting of a disqualification order is not immediately appealable.

II

A NON-CLIENT OF A FORMER GOVERNMENT ATTORNEY LACKS STANDING TO MOVE FOR DISQUALIFICATION OF A FIRM HIRING THAT ATTORNEY WHEN THE GOVERNMENT HAS GRANTED A WAIVER

The Motion to Disqualify Greitzer & Locks, as filed in the U.S. District Court to begin these proceedings, states

the following:

> This motion is brought on the grounds that participation by Mr. Peterson and Greitzer & Locks constitutes a direct violation of the Code of Professional Responsibility of the American Bar Association Canons 4, 5 and 9, Disciplinary Rules 9-101(B) and 5-105(D). . ."[10]

This naked allegation of the Motion, no facts having been pleaded, must be examined, for purposes of determining standing, in the light of the separate thrust of each of said Canons. Mr. Peterson's disqualification is, and always has been, fully conceded. For standing to plead and maintain an action for the disqualification of Peterson's employer, Greitzer & Locks, movants must be able to plead facts which, either by themselves or aided by presumptions of law, would show a violation of one of said Canons and the related disciplinary rule. As will follow, the movants utterly fail to do so.

The functions of Canons 4, 5 and 9 were carefully reviewed in *Fred Weber, Inc.* v. *Shell Oil Company*, 566 F.2d 602 (8th Cir. 1977), cert. den. 436 U.S. 905 (1978). Canon 4, said that Court, is limited by its language to the duty of the lawyer to his client. "Thus. . .one who seeks to employ Canon 4 to disqualify opposing counsel must show that counsel to have, or to have had, an attorney-client relationship with an adverse party in the present suit." While arguably applicable to Peterson, this Canon can in no way be directly invoked by the movants as to Greitzer & Locks. *Fred Weber* expressly rejects standing based on such relationships. Canon 4

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[10]Appendix E at A-106, A-107

protects the former client against the revelation of confidences, and can only be invoked by the former client or for his benefit. Certainly, it is absurd to permit these movants to invoke Canon 4 for the benefit of a client, the United States, which (i) has denied the existence of any confidences, (ii) has waived imputed disqualification, and (iii) has argued, in briefs to the Courts below, against imputed disqualification of Greitzer & Locks.

Canon 5, says *Fred Weber*, deals with professional zeal and precludes simultaneous representation of conflicting interests. Canon 5 guarantees to the client in pending litigation that his attorney's commitment of total loyalty and unfettered support and independent judgment will not be impaired by loyalty to past clients or other litigants. Nothing in the case at bar can be pleaded or proven to attach to Greitzer & Locks any of the impediments to which Canon 5 is directed. Only the asbestos plaintiffs, the clients now unhappily deprived of their services, have any standing to complain of a Canon 5 violation. Far from complaining of a violation, these plaintiffs by affidavits of those faced with early trial,* and by affidavits, briefs and testimony of the disadvantaged local counsel, have sought judicial relief from the prejudice and loss of lead counsel at a crucial and late stage in the litigation. . .a prejudice so obvious that an alert court might readily take judicial notice thereof.

It is acknowledged that DR 5-105(D), while originally confined to Canon 5 violations, could relate to a violation of other canons as well. As demonstrated above, it will not be applicable in this case, however, unless it requires imputed disqualification of Greitzer & Locks for a violation of DR 9-101(B). Under the general commandment of DR 9-101 to avoid "even the appearance of impropriety", Section B

*See App. K at A-144 et seq.

provides:

> A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

Taken at face value, and noting the conceded disqualification of Neil Peterson in the Virginia asbestos cases, DR 5-105(D) would appear to disqualify his new employer, Greitzer & Locks. However, it is crystal clear that the American Bar Association, in the interpretation and enforcement of the Canons, intends no such automatic result. ABA Formal Opinion 342* deals clearly and comprehensively with this subject, and expressly negates such a result for former government lawyers, where a screen is put in place. While not required, the express approval of Peterson's former government employer is plainly the most reliable criterion and should normally be controlling as to the efficacy of the screen. Here, the absence of a viable screen was never pleaded or proved, and while the government's formal waiver was admittedly not yet available and still being formulated when the motion was filed, the absence of a formal waiver was not pleaded or suggested in the Motion or in the deficient affidavit later filed in support thereof and ultimately withdrawn. Indeed, the record shows that, prior to filing their motion, the movants never made even the slightest inquiry of Greitzer & Locks, Neil Peterson or the Justice Department as to their concerns, nor did they give any prior hint of the Motion. Hence, neither the allegations of the movants nor any facts give the requisite standing to assert a violation of DR 9-101(B), or even state a justiciable claim.

*Appendix O at A-168 et seq.

III

THIS COURT SHOULD APPROVE AS A MATTER OF FIRST IMPRESSION THE USE OF "SCREENING" AS PRESCRIBED IN ABA FORMAL OPINION 342*

The District Court's rejection of a government approved screen set up by a former government attorney's law firm is in direct conflict with every other court that has reviewed such a screen. In *Kesselhaut* v. *United States*, 555 F. 2d 791 (Ct. Cl. 1977), the Court of Claims, sitting en banc, specifically sanctioned a screen set up by a private law firm to screen a former government attorney from participation in litigation against his former client, the United States government, in spite of the government's objection. See *Sierra Vista Hospital, Inc., et al.* v. *The United States*, 639 F. 2d 749 (Ct. Cl. 1981) wherein a Court of Claims panel affirmed a decision denying disqualification of three former government attorneys who were screened from other lawyers in their firm. Screening of a former Securities and Exchange attorney was also approved by the District Court in *Armstrong* v. *McAlpin*, 625 F.2d at 445, and by the District Court for the District of Columbia in *United States of America* v. *McDonnell Douglas Corporation, et al.* Criminal No. 79-516 (D.C. D.C. 1980) at 7. Moreover, an Illinois Circuit Court, considering a pro hac vice motion to admit Gene Locks in certain asbestos cases, was opposed by some of the same manufacturers as are Petitioners herein and considered nearly identical issues. The Court found no impropriety in allowing Locks to participate. App. G at A-110 et seq. We are aware of no court, other than the District Court below, which has overridden a government approved waiver. In fact, the more likely situation involves a court's supervisory review when the government refuses a waiver and unfairly constrains an attorney's right to practice. See *Kesselhaut, supra.*

*Appendix G.

The ABA Code of Professional Responsibility provides a mechanism whereby an attorney may appear against a former client,[10] after full disclosure, with the consent of all parties. DR 5-105(A). Such a consent, impliedly recognized in *Firestone*, is essentially a recognition that the former client is by far the most reliable judge of its own best interests. Where the former client accepts a screen and, after full consideration, waives imputed disqualification, who should be heard to complain? Only the new client, and certainly *not* a third party adversary whose interests are thoroughly inimical to both the old *and* new client.

ABA Formal Opinion 342 was adopted to avoid the unequal harshness DR 9-101(B) holds for government attorneys, by providing for a screening mechanism to prevent a former government attorney from sharing the secrets and confidence of the former client, the United States. A screen, coupled with a government waiver of imputed disqualification of the former government attorney's law firm is nothing more than the government's "consent". If screening were not available, an attorney, leaving the government's service, would "[a]utomatically infect all members of any firm he joined with his own personal disqualification, he would take on the status of a Typhoid Mary, and be reduced to sole practice under the most unfavorable conditions." *Kesselhaut*, 555 F.2d at 793.

The conduct of former government attorneys is regulated comprehensively by 18 U.S.C. § § 207-208 and the Code of Professional Responsibility. Petitioners are not asking this Court to formulate standards of conduct, but consistent with those rules of conduct, to approve

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[10] Rule 1.11(c) of the ABA Proposed Final Draft of its *Model Rules of Professional Conduct* provides for a screen to prevent the imputed disqualification of a former government attorney's law firm.

reasonable mechanisms to protect the United States and afford former government attorneys and their prospective employers the latitude necessary to make their skills marketable.

As noted in the United States' Amicus Brief, filed with the Appeals Court, the government has adopted a policy of granting waivers in appropriate circumstance. See excerpt from Brief of United States as Amicus Curiae, *Greitzer & Locks* v. *Johns-Manville, et al.*, No. 81-1379 (App. M at A-150 et seq.) Petitioners submit that the standards established in ABA F.O. 342 and employed by the government are more than adequate, if followed, to prevent taint to the trial proceedings.

Even the District Court recognized the standards and found that a screen was established whereby Peterson:

1. Could not directly work on the Norfolk cases.
2. Could not advise them on any matters concerning those cases.
3. Could not participate indirectly in those cases, by way of legal analysis, taking or preparing for any discovery, advice or in any other way whatsoever.
4. Could not be given access to any of the files.
5. Could not share in any monies derived from those cases. App. C at A-60, A-61.

Despite the absence of any evidence or any witness to testify to a breach of the screen, the District Court rejected the principle of screening, contrary to all established authority.

While Petitioners would not purport to set forth fully the government's interest, we respectfully suggest to the Court that it would be appropriate for its consideration of approving screening mechanisms to solicit the views of the United States in relation to this Petition for Certiorari.

IV

THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER OVER THE LOWER COURTS TO ARTICULATE STANDARDS FOR THE IMPUTED DISQUALIFICATION OF A FORMER GOVERNMENT ATTORNEY'S LAW FIRM

It is undisputed that:

1. Neil Peterson possessed no confidences of his former client, the United States Navy, in the Tidewater litigation. (See App. H at A-131 et seq. and App. I at A-136 et seq.) The Navy so states by letter.

2. A screen acceptable to and specially approved by the government was established by Peterson's law firm and never violated. (See App. J at A-138 et seq. and App. L at A-148 et seq.)

3. The government granted a waiver of *any* disqualification to the firm of Greitzer & Locks in the Tidewater litigation. (See App. J at A-148 et seq.)

4. There is no evidence or any concrete example of an indelible stamp or taint emanating from "[t]he fruits of a breach of confidence or by acts or omissions prompted by a divided loyalty." *Firestone* v. *Risjord*, 449 U.S. at 376.

Despite these uncontroverted facts, the District Court, (affirmed by an evenly divided Circuit Court, sitting en banc, and vacating its panel's decision) disqualified a law firm because it hired a former government attorney---an attorney whose former client, the United States, had waived the law firm's imputed disqualification pursuant to a procedure outlined and approved by the American Bar Association. The Court's holding, a bold example of the discredited prophylactic application of the American Bar Association's rules, is based upon mere speculation and hypothesis. The manufacturers presented no evidence to the court of any

breach of the screen. Nevertheless the court rejected the screen on the basis of unsupported conjecture:

> [I]t is unclear how disclosures, even inadvertant, can be prevented given the size of the firm and the prolonged nature of the litigation. Because of the magnitude of the litigation, there is the continuing risk that the agreement not to talk with Peterson about the cases or speak near Peterson about the cases will not be effective given the close, informal relationship which exists among law partners and associates. . . . App. C at A-83, A-84.

The District Court conveniently ignores the remarkable fact that the cases and files from which Peterson is screened are in eastern Virginia, and Peterson will be living and working in Philadelphia.

This Court, in *Firestone* v. *Risjord*, 449 U.S. at 376, implied that a showing of the "possibility" of taint in the trial proceedings is insufficient for disqualification. See also *Armstrong* v. *McAlpin*, at 445, 446. The movants have failed to show any concrete evidence of taint. Under these circumstances, the "appearance of impropriety is simply too slender a reed on which to rest a disqualification order. . particularly...where...the appearance of impropriety is not very clear." *Id.* at 445; *Board of Education of New York City* v. *Nyquist*, 590 F.2d 1241, 1247 (2d Cir. 1979).

In the face of increasing numbers of disqualification motions, often brought for tactical purposes, Petitioners submit that this Court should fashion guidelines for the lower courts to protect the interests of the clients involved, the attorneys, the public and the government, where appropriate. Their interests will be best satisfied by giving

them precedence where there is only a possibility of an appearance of impropriety unsupported by any evidence of taint in the proceedings. "Rather than heightening public skepticism we believe [this] restrained approach...." adopted by other courts"....towards attempts to disqualify opposing counsel on ethical grounds avoids unnecessary and unseemly delay and reinforces public confidences in the fairness of the judicial process." *Armstrong* v. *McAlpin*, 625 F.2d at 446. This Court [c]annot permit Canon 9 to be manipulated for strategic advantage on the account of impropriety which exists only in the minds of imaginative lawyers. *Woods* v. *Covington*, 537 F.2d 804, 819 (5th Cir. 1976).

The issue in this case is not whether one attorney is presumed to have confidences of a former client which he is presumed to transfer to a new client, but whether a non-client can raise a valid evidentiary claim of taint in the proceedings. It is inappropriate for the Court to deal with inferences and speculation. The basic question involved here is whether an attorney can exercise independent judgment and whether he *has* exposed confidences. Absent evidence of affirmative wrongdoing, an "appearance of impropriety" is not sufficient for disqualification.

If a violation of the Code of Professional Responsibility occurs during litigation, the courts, with the resources available and the "comprehensive disciplinary machinery" of the state and federal bar, should be able to deal with it. See *Armstrong*, 665 F.2d at 446 and *Nyquist*, 596 F.2d at 1246.

Standards are required to prevent a phophylactic approach. Imputed disqualification proceedings should never presume a violation, and may not be conducted in the spirit of a show cause hearing, such as took place in the District Court, which admitted to strong feelings by acknowledging:

> If the Court had been consulted prior to the

employment (of Neil Peterson), the Court would have reached the same conclusion...(App. C at A-96).

It is apparent from the District Court's opinion, as well as the proceedings which it conducted, that it required no evidence to satisfy the manufacturers' burden of proof to demonstrate prejudice; rather it placed the burden upon Greitzer & Locks to show why the firm should not be disqualified, a burden which, by using factually unfounded adverse inferences and speculation, it made impossible to satisfy.

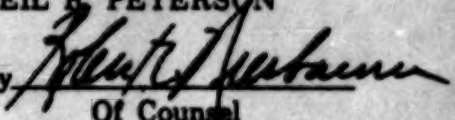
Given the undisputed facts that a government approved screen was established, that there was no evidence of a breach of the screen and the only reasoning of the Court developed for Petitioners' disqualification was based upon speculation, the case virtually screams out for this Court to exercise it supervisory powers to articulate a standard for disqualification of a former government attorney's law firm. This Court should enunciate such a standard by sanctioning the rules and opinions set forth by the American Bar Association and the Kutak Commission. Not to do so at this time will not only countenance, but will even encourage, the evils inflicted below upon 260 litigants and their youthful local counsel. That their legitimate interests were virtually ignored by the Dictrict Court is readily discernable from its opinion, and starkly clear from the record.

CONCLUSION

This case offers an up-to-date illustration of the classic use of law to obstruct justice. By merely filing their motion in November, 1980, and letting the matter take its course, the moving asbestos manufacturers have kept all but four cases of 260 plaintiffs from coming to trial. $25,000,000.00 of liability, conservatively estimated, was thereby postponed at least two years during a period when effective interest rates averaged fifteen percent (15%) or higher. It is informative that the chief movant, Johns-Manville Company, never opposed any stay sought by the plaintiffs pending the determination of these disqualification proceedings. With time running out at the bar of justice, Johns-Manville has now invoked the Bankruptcy Act and turned to Congress for relief from its own misdeeds. It is respectfully urged that this Court, as the ultimate Court of Justice, put the state of the law of disqualification into a set of rules which, while protecting the integrity of the judicial system, will not permit the system to be subverted in the deplorable fashion illustrated here. In retrospect, it is reasonably clear that the asbestos manufacturers put out the bait, and the District Court swallowed it, hook, line and sinker. Only this Court can undo the mischief in the pending case, and prevent the deluge which will inevitably follow if the District Court is not reversed. It is necessary that the real malefactor be identified; not the government lawyer with seventeen (17) years of honorable service; not the beleaguered law firm which innocently employed him to try non-Virginia cases,

and not 260 injured Virginia asbestos plaintiffs who could not possibly benefit from Peterson's employment. Otherwise apres nous, le deluge!

Respectfully Submitted,
GREITZER & LOCKS,
GENE LOCKS and
MARTIN GREITZER;
NEIL B. PETERSON

By 
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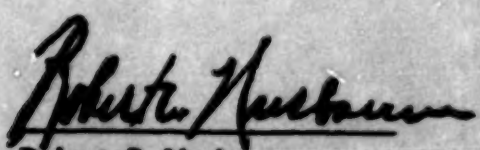
CERTIFICATE

I hereby certify that I have served three copies of the foregoing Petition for a Writ of Certiorari to all counsel of record this 15th day of September, 1982.


Robert C. Nusbaum
Counsel for Petitioners

Docket No. 82-444

Office-Supreme Court, U.S.
FILED
SEP 15 1982
ALEXANDER L. STEVAS,
CLERK

In The
Supreme Court of the United States

October Term, 1982

GREITZER & LOCKS, GENE LOCKS and
MARTIN GREITZER; NEIL R. PETERSON,
Petitioners,

v.

JOHNS-MANVILLE CORPORATION and
JOHNS-MANVILLE SALES CORPORATION;
RAYBESTOS-MANHATTEN, INC.;
EAGLE-PICHER INDUSTRIES, INC.;
UNARCO INDUSTRIES, INC.;
FIBREBOARD CORPORATION;
H.K. PORTER COMPANY;
SOUTHERN TEXTILE CORPORATION;
THE CELOTEX CORPORATION;
KEENE CORPORATION,
Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1379

Greitzer & Locks, Gene Locks and Martin Greitzer; Neil R. Peterson,

Appellants,

v.

Johns-Manville Corporation and Johns-Manville Sales Corporation; Raybestos-Manhatten, Inc; Eagle-Picher Industries, Inc.,; Unarco Industries, Inc.; Fibreboard Corporation; H.K. Porter Company; Southern Textile Corporation; Pittsburgh Corning Corporation; The Celotex Corporation; Keene Corporation,

Appellees,

United States of America,

Amicus Curiae.

Virginia Asbestos Plaintiffs,

Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk & Newport News. J. Calvitt Clark, Jr., District Judge.

Argued June 8, 1982 Decided June 17, 1982

Before WINTER, Chief Judge, BUTZNER, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN, CHAPMAN, Circuit Judges, sitting in banc.

Robert C. Nusbaum (Hofheimer, Nusbaum, McPhaul & Brenner on brief) for Appellants; C. Michael Montgomery, C. Grigsby Scifres (Seawell, Dalton, Hughes & Timms on brief) for Johns-Manville Corp. and Johns-Manville Sales Corp.; Archibald Wallace, III (Albert D. Bugg, Jr., Sands, Anderson, Marks & Miller on brief) for H.K. Porter Co., Inc. & Southern Textile Corporation; (William V. Hoyle, Charles A. Smith, Philip S. Payne, Hoyle, Corbett, Hubbard, Smith & Payne on brief) for Raybestos-Manhattan, Inc.; (William B. Eley, Eley, Rutherford & Leafe on brief) for Eagle-Picher Industries, Inc.; (Gerard E. W. Voyer, Taylor, Walker & Adams on brief) for Unarco Industries, Inc.; (Stuart Bateman on brief) for Fibreboard Corp.; (Worth Banner, Reynolds, Smith & Winter on brief) for Pittsburgh Corporation; (John Y. Pearson, Jr., Bruce T. Bishop, Willcox, Savage, Lawrence, Dickson & Spindle on brief) for Celotex Corp.; (Henry C. Morgan, Jr., Pender, Coward, Addison & Morgan on brief) for Keene Corp.

PER CURIAM:

The judgment of the district court is affirmed by an equally divided court.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1379

GREITZER & LOCKS, GENE LOCKS AND MARTIN GREITZER; NEIL R. PETERSON,

Appellants,

v.

JOHNS-MANVILLE CORPORATION AND JOHNS-MANVILLE SALES CORPORATION; RAYBESTOS-MANHATTEN, INC; EAGLE-PICHER INDUSTRIES, INC; UNARCO INDUSTRIES, INC.; FIBREBOARD CORPORATION; H. K. PORTER COMPANY; SOUTHERN TEXTILE CORPORATION; PITTSBURGH CORNING CORPORATION; THE CELOTEX CORPORATION; KEENE CORPORATION,

Appellees,

UNITED STATES OF AMERICA,

Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Virginia at Norfolk and Newport News. J. Calvitt Clarke, Jr., District Judge.

Argued October 5, 1981 Decided March 5, 1982

Before WIDENER, MURNAGHAN and CHAPMAN, Circuit Judges

Robert C. Nusbaum (Hofheimer, Nusbaum, McPhaul & Brenner on brief) for Appellants; C. Michael Montgomery (C. Grigsby Scifres, Seawell, Dalton, Hughes & Timms; William V. Hoyle, Charles A. Smith, Philip S. Payne, Hoyle, Corbette, Hubbard, Smith & Payne; William B. Eley. Eley, Rutherford & Leafe; Gerard E. W. Voyer, Taylor, Walker & Adams; Stuart Bateman; Archibald Wallace, III, Albert D. Bugg, Jr., Sands, Anderson, Marks & Miller; Worth Banner, Reynolds, Smith & Winters; John Spindle; Henry C. Morgan, Jr., Pender, Coward, Addison & Morgan on brief) for Appellees; (Richard S. Glasser, Glasser and Glasser; Robert R. Hatten, Patten and Wornom on brief) as Amicus Curiae for Virginia Asbestos Plaintiffs (Stuart E. Schiffer, Acting Assistant Attorney General, Justin W. Williams, United States Attorney, Robert E. Kopp, John F. Cordes, Civil Division, Department of Justice on brief) as Amicus Curiae for United States.

CHAPMAN, Circuit Judge:

This appeal is from orders disqualifying the law firm of Greitzer & Locks from participation in approximately 77 Virginia asbestosis cases in which it serves as counsel. The three judges of the Norfolk and Newport News Divisions of the Eastern District of Virginia, sitting en banc, disqualified the law firm from participation in all asbestosis cases filed in Virginia because the firm employed Neil R. Peterson, who until his employment with Greitzer & Locks had been the Justice Department litigator charged with defending the United States in the Virginia asbestosis cases.

Greitzer & Locks is a six person firm located in Philadelphia, Pennsylvania. Peterson joined the firm in October of 1980 as the sixth attorney and fourth associate at the firm. In

addition to the Virginia asbestosis litigation, the firm participates in approximately 1200 other asbestosis cases nationwide. Appellees (hereafter "manufacturers") manufacture and distribute products containing asbestos.

On April 23, 1981, the so-called Norfolk asbestosis litigation involved 333 individual plaintiffs. This litigation comprised essentially all of the asbestosis litigation pending in Virginia. The United States was a party to claims of 246 of the individual plaintiffs' claims. These 246 individual claims comprised 77 separate civil actions. Greitzer & Locks served as co-counsel, representing 223 plaintiffs in 67 of these civil actions. Greitzer & Locks represented a total of 260 plaintiffs in the Norfolk litigation, whose claims comprised 77 separate civil actions.

Since this circuit follows the rule permitting appeal of orders granting motions to disqualify counsel pursuant to the "collateral order" exception to the finality requirement of 28 U.S.C. §1291, Aetna Casualty & Surety Co. v. United States, 570 F.2d 1197, 1200 (4th Cir. 1978), cert. den. 439 U.S. 821 (1978), jurisdiction of this appeal is pursuant to §1291. The question of appealability of orders disqualifying counsel was expressly reserved in the Supreme Court's recent ruling in Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981). Since this opinion expressly reserved the question of appealability of orders disqualifying counsel, Aetna Casualty & Surety Co., supra, is still binding authority in this circuit.

There is no question that Peterson is disqualified from participation in

the Virginia asbestosis cases. The fact of his personal disqualification was recognized in advance of the motion for disqualification by Peterson, the government and Greitzer & Locks, who all agreed that Peterson was to be screened from participation in the Virginia cases. This appeal concerns whether Greitzer & Locks should be disqualified from continued participation in the Virginia asbestosis cases despite the firm's efforts to screen Peterson from participation in any asbestosis cases in which the United States is a direct defendant and from all asbestosis cases in Virginia.

Our scope of review in this matter is not limited to abuse of discretion as appellees contend. In disqualification cases where the facts are not in dispute, as they are not here, it is appropriate for the appellate court "to

determine whether the District Court's disqualification order was predicated upon a proper understanding of the applicable ethical principles." Woods v. Covington Cty. Bank, 537 F.2d 804, 810 (5th Cir. 1978); Aetna Casualty & Surety Co., supra, at 1200. It is our opinion that the district court erred in concluding that the screen approved by the government would not be sufficient to protect the government from inadvertent disclosure of confidences and trial secrets Peterson may have learned while with the government.

In 1977 Peterson was employed as special litigation counsel in the Civil Division of the Department of Justice, where his duties were "to be generally involved with the coordination of the defense of asbestos litigation against the United States, and to personally undertake the defense of one major group

of asbestos cases, the . . . Norfolk cases." Peterson's principal duty from September 1977 until October 1980 was to act as counsel for the United States Navy in the Norfolk litigation. During this same period, Peterson provided strategy for the defense of the United States in asbestosis litigation generally.

In January of 1980, Peterson began looking for a position with a private firm. Sometime in July of 1980, Gene Locks of Greitzer & Locks heard that Peterson was looking for private employment and contacted Peterson about employment with Greitzer & Locks. In August of 1980, Peterson consulted the Office of Legal Counsel of the Justice Department about his employment with Greitzer & Locks. There he was advised that the Ethics in Government Act prohibited his participation in the Norfolk

cases. He was also advised that if he went with Greitzer & Locks, he would have to be screened from the firm's participation in these cases. Greitzer & Locks agreed to these limitations.

On September 10, 1980, Peterson formally advised the Civil Division of the Justice Department that he planned to participate in asbestosis litigation upon his association with Greitzer & Locks. Peterson noted his "understanding" with Greitzer & Locks that he would not participate in the Norfolk cases and certain other cases in which he participated while in government. Peterson provided the Department with proposed "shielding" provisions and asked it to indicate that it "would have no objection to the firm of Greitzer & Locks continuing to participate in current litigation, particularly that in Norfolk and Newport

News, Virginia . . . provided the firm complies with . . . 'shielding' provisions . . .." The specified shielding provisions prohibited Peterson from working, advising, or participating, indirectly, by discovery, analysis or otherwise, in the Virginia cases. He was to be denied access to the files and prohibited from sharing in profits derived from the Virginia cases.

The Civil Division was not able to finalize a recommendation for Peterson by the end of September. Peterson was therefore asked to submit a memorandum projecting his first month's duties with Greitzer & Locks. Peterson submitted this memorandum on September 30, 1980, and he left the Department of Justice effective October 3, 1980.

The Civil Division solicited its client agencies' views on Peterson's waiver request. The Department of

Health and Human Services and the Department of Labor expressed reservations about Peterson working for Greitzer & Locks, specifically noting Peterson's access to government asbestosis files and knowledge of government litigation strategy. The Navy, the client agency in the Virginia litigation, did not object to waiver of Greitzer & Locks' participation in these cases, but it did reserve its objection to the firm's participation in other cases. The Office of Legal Counsel noted that Peterson should be screened from all cases involving his client agencies, not just those in Virginia.

The Justice Department had not acted on the proposed screening arrangement by November 26, 1980, the date the manufacturers filed their motion to disqualify Greitzer & Locks from participation in the Virginia cases. Counsel for

Peterson met with the Justice Department in early January. In response to concern about Peterson's participation in any asbestosis actions against the United States, Peterson submitted a revised proposal in which he was to be screened from all asbestosis actions in which the United States was a direct defendant. In addition, in those cases in which the United States was or might become a third-party defendant, Peterson's participation was to be confined to those aspects of the plaintiffs' cases against the direct defendants. Peterson was also to be barred from taking discovery from the United States or from deposing or cross-examining any government witness. The Justice Department, on January 8, 1981, wrote Peterson, informing him that the Civil Division and all client agencies had waived "imputed disqualification" of

Greitzer & Locks from the Virginia asbestosis litigation, provided Peterson and Greitzer & Locks abided by the screening arrangements.

The merits of the appeal focus on two disciplinary rules in the ABA Code of Professional Responsibility. The first is D.R. 9-101(B), which reads as follows, "A lawyer shall not accept private employment in a matter which he had substantial responsibility while he was a public employee." The second disciplinary rule is D.R. 5-105(D), which reads as follows, "If a lawyer is required to decline employment or to withdraw from employment under a disciplinary rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

A literal interpretation of D.R. 5-105(D) would require widespread

disqualification of firms employing former government attorneys. The American Bar Association, however, does not interpret D.R. 5-105(D) to mandate law firm disqualification whenever employment of a government attorney results in a firm conflict of interest. In Formal Opinion 342 the ABA Ethics Committee takes the position that disqualification of the firm may not be necessary if the disqualified lawyer has been properly screened from participation in the case and there is "no appearance of significant impropriety affecting the interests of the government." 62 A.B.A.J. 517 (1976).

Other appellate courts have followed the ABA's lead and rejected a literal interpretation of D.R. 5-105(D) when the disqualified government attorney is properly screened. Woods v. Covington Cty. Bank, supra at 812-13; Armstrong v.

McAlpin, 625 F.2d 433, 445 (2nd Cir. 1980) (en banc), vacated on other grounds, 449 U.S. 1106 (1981). This court has expressed dissatisfaction with automatic, mechanical applications of the Code of Professional Responsibility. Aetna Casualty & Surety Co. v. United States, supra at 1202. We now rule that, when appropriate, the intrafirm screen is an acceptable alternative to automatic disqualification of a law firm hiring a former government attorney.

The plaintiffs and the Justice Department (on brief as amicus curiae) argue that the district court erred in rejecting the screening arrangement between Peterson and the other attorneys in Greitzer & Locks since the screen had been approved by the government. In Formal Opinion 342 the ABA Ethics Committee takes the position that the government may waive disqualification of

the firm "whenever the government agency is satisfied that the screening measures will effectively isolate the individual lawyer from participating in the particular matter and sharing in the fees attributable to it, and that there is no appearance of significant impropriety affecting the interests of the government . . .."[1] 62 A.B.A.J., supra. We are satisfied that the affected client agencies of the government are often the best judges of the suitability of screens erected to protect them from disclosure of confidences and secrets. For this reason, the government's waiver of imputed disqualification of a law firm is entitled to substantial deference. Formal Opinion 342, supra;

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1. Formal Opinion 342 also provides that government waiver of imputed disqualification does not relieve the affected law firm from undertaking its own independent evaluation of the screening arrangement.

ABA Proposed Final Draft of the Model Rules of Professional Conduct, Rule 11.1 (May 31, 1981).

Notwithstanding the deference to be afforded a governmental waiver of imputed disqualification, the courts have an independent duty to evaluate the effect on the trial process of the continued participation of an otherwise disqualified law firm. See Kesselhaut v. United States, 555 F. 2d 791 (Ct. Cl. 1977) (en banc) (per curiam); Accord, Hull v. Celanese Corporation, 513 F.2d 568 (2nd Cir. 1975); Ethical Problems for the Law Firm of a Former Government Attorney: Firm or Individual Disqualification, 1977 Duke L.J. 512, 520-21, 528.

The district court concluded that the intrafirm screen approved by the government would not effectively shield the government from accidental disclo-

sure of confidences and trial strategy known by Peterson. The court noted that Peterson would be participating in the trial or settlement of approximately one thousand asbestosis cases. It reasoned that these cases would take a considerable amount of time to litigate and that the small size of Greitzer & Locks and the prolonged nature of asbestosis litigation would make inadvertent disclosures inevitable. In disqualifying Greitzer & Locks the court also relied on the possibility that Peterson had already passed confidential information to other members of the law firm. This possibility of past disclosure was based on the fact that during October, November and December of 1980 Greitzer & Locks operated under the assumption that Peterson was only to be barred from participation in the Virginia cases. The court reasoned that

there was a real possibility Peterson had inadvertently disclosed confidential information while free to work on non-Virginia asbestosis cases involving the United States. Finally, the court concluded that Greitzer & Locks' unique caseload made it impossible to screen Peterson from participation in profits from all cases in which the United States was a direct defendant.

The district court was correctly concerned that the small size of Greitzer & Locks, when considered in terms of the firm's caseload (1200 asbestosis cases nationwide), would work against effectiveness of the screen. The court was also correct to be concerned about the possibility of inadvertent disclosure from the time Peterson went to work for Greitzer & Locks until the time the government approved the screen precluding Peterson's par-

ticipation in any cases against the United States.[2] See note, the Chinese Wall Defense to Law-Firm Disqualification, 128 U.Pa.L.Rev. 650, 712-13 (1980).

Doubts about the size of a firm and timely implementation of the screen may sometimes be sufficient to reject a screening arrangement. Cheng v. GAF Corporation, 631 F.2d 1052, 1058 (2nd Cir. 1980), vacated on other grounds, 101 S.Ct. 1338 (1981). On the other hand, when the government has waived imputed disqualification of a firm,

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2. While we agree that it is necessary to screen Peterson from financial participation in the Virginia cases and other cases in which the United States is a direct defendant, we do not agree with the district court that it is impossible for Greitzer & Locks to screen Peterson from direct financial participation in these cases. The indirect benefits that might accrue to Peterson do not make the screen unacceptable when Greitzer & Locks makes every effort to screen him from direct financial participation in these cases.

there is a strong probability that there has been a knowing waiver of disqualification and that the government is willing to bear the risk of inadvertent disclosures. We believe, therefore, once imputed disqualification has been waived, a possibility of inadvertent disclosure based on the size of a firm and its relative caseload is not a sufficient reason for rejecting a screening arrangement such as that in this case.

As noted in Aetna Casualty & Surety Co. v. United States, supra, we are concerned with "how real in the practical world [asserted ethical problems] are in fact." In this case the district court merely speculated that opportunities for inadvertent disclosures would arise without analyzing the specific situation in which the disclosures were to take

place.[3]

Peterson will be participating in the non-Virginia asbestosis actions against the manufacturers with other attorneys at Greitzer & Locks. Other attorneys will be participating in asbestosis actions directly against the United States. Both the direct actions against the manufacturers (on which Peterson and other attorneys at Greitzer & Locks will be working) and the direct actions against the United States (on which Peterson's co-attorneys will be working) appear to be proceeding on the same theories of liability -- negligent failure to warn, implied warranty, and strict tort. If the manufacturer's

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3. While we rule that the district court's finding of a possibility of inadvertent disclosure is too speculative, this opinion is not a ruling on the minimum showing that will be sufficient to overcome a governmental waiver of imputed disqualification.

liability is so intimately related to actions by the government, that Peterson and the other attorneys at Greitzer & Locks cannot work together on the actions against the manufacturers without Peterson disclosing confidences that would taint the Virginia plaintiffs' direct claims against the government, then disqualification of Greitzer & Locks from the Virginia plaintiffs' direct actions against the United States would be justified.

We are unsure, after considering the present record and the district court's conclusions based on a comparison of the size of Greitzer & Locks and its case-load, whether such a danger in fact exists. One circumstance making such a ruling less likely is the fact that Peterson will only be participating in non-Virginia asbestosis actions, which will of necessity arise in a different

location than the Virginia actions, and thus be less factually similar to the actions in Virginia.[4] The less similar the actions, the more likely it is that Peterson and the other attorneys at Greitzer & Locks can work together on the non-Virginia actions without risking disclosure.

Based on the foregoing, we believe that the district court failed to show that the continued participation of Greitzer & Locks in the actions directly against the United States presents a sufficient taint to the underlying trial of those cases so as to reject the government's waiver of imputed disqualification. Accordingly, we vacate the

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4. Most Norfolk and Newport News asbestosis cases involving the United States as a named defendant or a third party defendant originate in the construction or repair of Navy ships, which will not be true in many parts of the country where the firm represents asbestosis plaintiffs.

order of the district court disqualifying Greitzer & Locks from these claims.

The district court also disqualified Greitzer & Locks from further participation in the Virginia asbestosis actions directly against the manufacturers. We find that the facts in this case do not justify imposition of this harsh remedy and reverse the district court's action with respect to these cases.

The United States is joined as a third-party defendant in some of the plaintiffs' actions against the manufacturers. When he was employed by the government, Peterson was in an adversarial position to the manufacturers in these cases. Peterson did not participate in the direct defendants' strategy sessions; he did not attend settle-

ment conferences;[5] nor did he undertake joint discovery with the manufacturers.[6] Now that Peterson is with Greitzer & Locks, he continues to be in an adversarial position to the manufacturers, but he is screened from participation in any of the Virginia cases against them.

The district court accepted the manufacturers' contentions that the screen approved by the government would not adequately protect the manufacturers from the possibility of inadvertent disclosure of confidential information. While the district court was unquestion-

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5. In connection with the appeal in Glover v. Johns-Manville Corporation, 662 F.2d 225 (4th Cir. 1981), Peterson was permitted to glance at the breakdown of the manufacturer's contributions to the settlement of the direct action in that case. As noted in the appellate opinion, each contribution was less than $10,000. Id.

6. When Peterson was with the government, counsel for plaintiffs and the manufacturers separately interviewed certain government witness Peterson was privy to notes taken during these interviews by counsel for both sides.

ably obligated to carefully scrutinize any evidence of actual prejudice to the manufacturers, one important circumstance distinguishes our analysis of the manufacturers' position from that of the government. Since Peterson and the government were in an attorney-client relationship, the government was entitled to a presumption that Peterson learned confidences and secrets while employed there. E. g., In re Yarn Processing Patent Validity Litigation, 530 F.2d 83, 89 (5th Cir. 1976); Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2nd Cir. 1973). Since there is not attorney-client relationship between Peterson and the manufacturers, they are not entitled to a presumption that Peterson acquired confidential information about them while he was with the government. Fred Weber, Inc. v. Shell Oil Company, 566 F.2d 602

608 (8th Cir. 1977), cert. den. 436 U.S. 905 (1978).

In the absence of such a presumption and in the face of a governmental waiver of imputed disqualification, we believe that the district court should have had evidence of actual prejudice to the manufacturers before rejecting the screen. We find no such evidence in this record.

The manufacturers direct attention to the fact that Peterson had access to proprietary information about them that had been disclosed to the Navy Bureau of Medicine & Surgery. They also point out that Peterson was privy to notes defense counsel had taken during interviews of government witnesses (see note 5 supra) and that Peterson glanced at a breakdown of the manufacturers' contributions to the Glover settlement (see note 4 supra).

Any specific recollection that

Peterson may have of the breakdown in the Glover settlement is not likely to be inadvertently disclosed. Furthermore, the breakdown in the manufacturers' contributions to the settlement of each case varies according to the relative exposure of each individual plaintiff to each manufacturer's products. Thus, it is unlikely that Peterson gained any material insight by glancing at the settlement breakdown.

The manufacturers were also unable to demonstrate that the interview notes or proprietary information contained confidences that would materially prejudice their defense of the Virginia cases. In the absence of such evidence

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7. Asbestos litigation is of recent origin and has had explosive growth in the past five years. The number of potential cases cannot be determined. To bar Peterson from practicing as a private lawyer in this growing field of law would be unfair, particularly in view of the screen protecting his former employer and client.

and given the fact that Peterson has been screened from the Virginia cases, we believe that the manufacturers have not demonstrated that Greitzer & Locks should be disqualified from the Virginia asbestosis actions because of Peterson's access to confidential information.

The district court also ruled that Greitzer & Locks should be disqualified from all Virginia asbestosis actions because Peterson's switching sides in the midst of the asbestosis litigation created an impermissible appearance of impropriety. Intrafirm screens are destined to an uneasy relationship with the mandate of Canon 9 to avoid even the appearance of impropriety. As one commentator has suggested,

> Although broad in scope, that requirement's main thrust is to obligate a lawyer to "promote public confidence" in the American legal system "and in the legal profession." No matter how effective, Chinese walls are not likely

> to foster public confidence because the details of a law firm's efforts to avoid disqualification will doubtless make but a small impression upon public awareness. (footnotes omitted).

The Chinese Wall Defense, supra at 685. Other appellate courts have recently refused to reject an intrafirm screen solely on the basis of appearance of impropriety. Cf. Woods v. Covington Cty. Bank, supra, (must be "at least a reasonable possibility that some specifically identifiable impropriety did in fact occur") and Armstrong v. McAlpin, supra at 445 ("appearance of impropriety is . . . too slender a reed on which to rest a disqualification order"). We also decline to reject the instant screen solely on the basis of appearance of impropriety.

Accordingly, the order of the district court disqualifying Greitzer & Locks from the Virginia asbestosis

actions against the manufacturers if reversed; the order of the district court disqualifying Greitzer & Locks from the asbestosis actions directly against the United States is vacated.

REVERSED IN PART;
VACATED IN PART.

MURNAGHAN, Circuit Judge, dissenting:

I dissent.

As is customary in cases on appeal, we do not approach the problem afresh. We have already the determination not simply of one but of three experienced district judges that fairness will not be served in the conduct of litigation in the United States District Court for the Eastern District of Virginia if the firm of Greitzer & Locks, the employer of Peterson, is permitted to continue to represent a large number of plaintiffs in asbestosis litigation.

Had the case come to us simply in the posture of a timely imposed screen insulating Peterson in advance from contacts productive of conflicts of interest, actual or apparent, I should be more inclined to accept the view of the majority. Even then, however, the reasoned judgment of three district

judges would command my respect, and I would not lightly interfere with a decision so intimately concerned with the conduct of affairs in their court.

In any event, however, that is not the situation. Peterson had served for several years as the lawyer in charge of the defenses raised by the United States government, especially the United States Navy, in asbestos claims arising in or near Norfolk and Newport News, Virginia. A law suit with multiple parties generally involves dividing up into sides. The United States and the manufacturers, as defendants, were on one side. The plaintiffs in many instances represented by Greitzer & Locks were on the other. While, in many respects, the defendants had non-coincidental positions and could be expected to jockey so as to shift liability away from themselves and toward the other defendants,

nevertheless, they had an important common purpose, namely, to avoid liability altogether. In terms of appearances, not just to the public but to the bench and bar, it stretches belief unduly not to assume that there was compromise of Peterson as counsel for plaintiff in any asbestosis case arising in Virginia and of any employer which might hire him.

In view of that it was incumbent on Peterson as a prospective employee and especially incumbent upon Greitzer & Locks as a possible employer to take every precautionary step available to them before acting so as to put themselves in a fait accompli situation. Instead they rushed to act without formalizing a satisfactory screen arrangement, and then, having already entered an employment arrangement they sought to speak in pitiable terms about the hardship to clients and to "poor"

Peterson in terms of dislocations which would result from disqualification.

However, the situation was altogether one of Greitzer & Locks' own making. Even though a lawyer has practiced in a specialized area, he has not vested right to make one group of cases a lifetime project, especially where conflicts of interest are palpable and remain, unless and until resolved in advance, inescapable disqualifiers. Peterson must, along his professional path, have obtained trial experience and other lawyer-like attribute enabling him to perform in other areas than purely and solely asbestosis claims. He doubtless was capable of earning a living in other areas. It was obviously a sensitive matter for him to take employment from a firm representing plaintiffs in asbestosis cases in Virginia when he had been working in the

same field as a defendant's lawyer for the government.

A self-imposed, unilaterally regulated "screen" leaving just to the employer, Greitzer & Locks, and the employee, Peterson, decisions as to the extent of isolation and degree of monitoring could not conceivably have sufficed. That should have been self-evident to Peterson.

Greitzer & Locks should have been at least as sensitive to the problem as Peterson. Peterson's employment with the government continued until Friday, October 3, 1980. Less than a month before, Peterson asked the Justice Department's consent to a screening arrangement which would permit him to take employment with Greitzer & Locks. There is no evidence of unreasonable delay on the part of the Justice Department in not having an answer to a

complicated question involving several government agencies in the short span of twenty-odd days. Peterson essentially immediately[1] after departure from government employment, on October 6, 1980, began providing his services to Greitzer & Locks without having worked out any agreement with his erstwhile employer, the government, to satisfy justifiable anxieties and concerns which that immediately previous employer manifestly felt. The behavior of Greitzer & Locks in permitting employment to become effective in such circumstances was simply unprofessional and unacceptable.

Subsequently, a screening process imposing substantial increases in restrictions on Peterson and on Greitzer

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1. October 4, 1980, was a Saturday, and October 5, 1980, was a Sunday.

& Locks was worked out between Peterson and the government, although it was not accomplished until four months later on January 9, 1981.[2] A screening process

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2. In this connection, it is not irrelevant to observe that the waiver of disqualification did not proceed purely and simply from satisfaction on the government's part that it would not be disadvantaged by Peterson's employment by Greitzer & Locks. Rather, it was in large measure a matter of the lesser of two evils. In the case of two evils, one does not cease to be an evil just because it is accepted by the person faced with the choice, in order to avoid a greater evil. The government was concerned that, in the future, in other cases, involving other parties, it might encounter difficulty in obtaining desired employees who might be disinclined to work for the government if that meant that they would subsequently have to forego other employment. Yet the reasons for rules requiring such foregoing of attractive employment possibilities stemmed from other sources besides simply an employer such as the Department of Justice or the United States Navy. They have to do with the question which is core central here, namely, the insurance of fairness and unquestioned impartiality, without undue advantage, in the administration of justice. The manufacturer defendants, while naturally doubts arise as to their motivations in seeking disqualification of opposing lead counsel in a large number of cases, are, nevertheless, entitled to a judicial atmosphere uncontaminated by the ineradicable grounds for suspicion which Greitzer & Locks and Peterson have created by their behavior in the present case.

is an understandable procedure for approaching the tangled and troubled question of potential conflicts on the part of lawyers. It must be recalled, however, that the customary situation arises with respect to one or at most a handful of cases. Most situations do not involve the magnitude of hundreds of separate pieces of litigation such as are here involved.

Furthermore, and most basically, a screening process depends on the unquestioned integrity of those whose undertakings totally to disassociate themselves from certain aspects of specific litigation, or from conduct of affairs of their law firms in some areas, must be worthy of unquestioned belief.[3]

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3. "It is the possibility of the breach of confidence, not the fact of the breach, that triggers disqualification." Trane v. Smith, 621 F.2d 994, 999 (9th Cir. 1980).

Greitzer & Locks and Peterson did not come before the district court entitled to such implicit faith in their words. They tarnished their reputation for reliability and dependability by their actions in October 1980 when Peterson was hired by Greitzer & Locks in circumstances of "just trust me, you've nothing to worry about." The district court acted in its discretion in losing faith.[4] It, therefore, acted in its

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4. The district court noted:

(2) Peterson accepted employment with the law firm and went to work with the firm before any agreement was worked out between the Government and the firm.

(3) Peterson worked with the firm for three months before waiver agreement was worked out.

J.A. at 595.

This hardship quite properly rests with the firm which knowingly undertook the employment of an individual in the face of the Code's clear prohibition, without first securing a Government waiver and seeking approval of the screening procedures from this Court.

J.A. at 598.

discretion in finding that a screen, the success of which depended on persons who were not dependable, was not sufficient to the purpose.

Appellants make much of the supposed regrettable imposition suffered by the clients in the hundreds of asbestosis cases here involved. Quite apart from the consideration that, whichever way our decision may turn, some clients are going to be injured, and independently of the fact the Greitzer & Locks brought it on themselves and on their clients, I venture the observation that the client loss through disassociation from Greitzer & Locks may not be as severe pictured by that interested party. In the first place, it is to me a matter of some concern that, as the record reveals, Greitzer & Locks established a uniform policy, presumably for the approximately 1500 cases in which it

represents the plaintiffs, of demanding a contingent fee amounting to 40% of the gross recovery, as well as all costs incident to the services provided, unless there were an appeal, in which case the compensation would increase to 45%. The justification for such large percentages in contingent fee situations derives from the risk that the plaintiff may lose and that his or her counsel, heretofore, may have expended substantial effort yet have gone entirely uncompensated. The validity of that assumption is strong when one considers a single case. However, its reliability as a foundation essentially dissipates as the number of cases increases and the virtual certainty of recovery in many of them increases with it. That Greitzer & Locks itself should not have moved on its own to ameliorate what appears to me a very questionable overall fee arrange-

ment suggests a mercenary approach inconsistent with the duty of fair representation. While plaintiffs may lose a little in time in securing new representation, their likelihood of benefitting in the end is at least as great as the hypothetical loss from having Greitzer & Locks disqualified as their representatives.

Along the same lines consider the awkwardness of the approach taken by Greitzer & Locks to the present appeal. The firm did not, as far as the record discloses, even consult a single client as to whether the appeal should be lodged. The appeals were simply filed in the name of the law firm itself. The indication again is strong that the lawyers' welfare took precedence in the minds of Greitzer & Locks over the welfare and interest of the clients. We have made no point of the possible lack

of jurisdiction deriving from the want of a proper party appellant. Generally the rules are applied very liberally so as not to cost a party his day in court. Nevertheless, the contention was vigorously advanced by appellees, yet could have been eliminated in advance by the simple expedient of obtaining the consent of at least one and perhaps several appellants. That indicates a lack of that thoroughness which we generally associate with first-rate counsel.

Greitzer & Locks put forward as an extenuation the consideration that, with the number of its asbestosis clients well in excess of 1000, it would impose an impossible burden to require it to obtain authorizations to appeal from each plaintiff. However, that argument is not available in the usual case involving only one or at most a handful

of would-be appellants, and it really boils down, therefore, to a clear demonstration that, by undertaking representation of such a large number of parties, Greitzer & Locks confessedly has given and has been content to give to each plaintiff less thorough representation than if it had restricted the number of representations it sought to undertake in the same area.

This is not an entirely trivial observation. The case belongs to the client, not to the lawyer. It is not beyond the realm of possibility that one or more individual plaintiffs, had they been asked and fully informed of their alternatives, as they were entitled to expect, might have decided that they wished to take advantage of the existence of the disqualification order in the district court to substitute other counsel more qualified, in the

minds of the plaintiffs at least, to present their case in the strongest most effective fashion.

Accordingly, I would affirm the decision promulgated by the three district judges.[5]

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5. It will, perhaps, not go unobserved that I have omitted referring to the American Bar Association's Code of Professional Responsibility as a source of support for my conclusion. The ABA Code is but one set of moral standards, albeit one worthy of close attention and not lacking in persuasive authority. The point is that the result arrived at by the district court should be affirmed even had no ABA Code existed.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK & NEWPORT NEWS DIVISIONS

IN RE: ASBESTOS CASES CP-77-1

AMENDED OPINION AND ORDER

Between 1977 and 1980 Neil R. Peterson defended the United States in a major group of asbestos cases (the Norfolk cases) in the Norfolk and Newport News Divisions of the United States District Court for the Eastern District of Virginia. In 1980, Mr. Peterson joined the law firm of Greitzer and Locks. As of April 23, 1981, Greitzer and Locks was co-counsel of record representing two hundred sixty (260) plaintiffs, the United States being involved in two hundred twenty-three (223) of such claims. This matter is before the Court to determine whether the employment of Greitzer and Locks of Neil R. Peterson requires

disqualification of the law firm from further participation in the Norfolk cases.

Background

This matter arises out of one group of a great number of claims that have been brought in various jurisdictions by plaintiffs alleging that they have contracted asbestos-related diseases through exposure to asbestos while employed at various government and private shipyards and plants. The plaintiffs have brought these suits against the manufacturers of the asbestos products and in many cases the manufacturers have brought in the Government and the various shipyards as third-party defendants to the actions. In some cases, the plaintiffs have filed direct actions against the United States.

The Norfolk litigation presently* involves three hundred thirty-three (333) individual plaintiffs who have filed asbestos-

related claims in the Norfolk and Newport News Divisions of the United States District Court for the Eastern District of Virginia. In the Norfolk litigation, the United States is a party to the claims of two hundred forty-six (246) of these individual plaintiffs. These two hundred forty-six (246) individual claims are represented in seventy-seven (77) separate civil actions. A number of the defendant-manufacturers of asbestos in the Norfolk cases have filed a motion to disqualify the law firm of Greitzer and Locks, which as of April 23, 1981, serves as co-counsel representing two hundred sixty (260) plaintiffs in the asbestos cases filed and pending in this Court, because of the firm's employment of Neil R. Peterson, who previously represented the Government in the Norfolk litigation. The full statistics relating to the involvement of Greitzer and Locks, Mr. Peterson and the

United States are revealed in the following tabulation.

*Pending Asbestos Cases
Norfolk/Newport News Divisions
As of April 23, 1981

Total number of individual plaintiffs	333
Total number of civil actions	114
Total number of plaintiffs where United States is a party	246
Total number of civil actions where United States is a party	77
Total number of plaintiffs represented by Greitzer and Locks	260
Total number of civil actions where Greitzer and Locks is co-counsel	78
Total number of plaintiffs where United States is a party and Greitzer and Locks is co-counsel	223
Total number of civil actions where United States is a party and Greitzer and Locks is co-counsel	67

The defendants urge that Canons 4, 5, and 9 and Disciplinary Rule 5-105(D) require the disqualification of Peterson's law firm despite the screening arrangements adopted by the firm. Neil Peterson

and the law firm of Greitzer and Locks urge that the screening procedures adopted by the firm will adequately shield Mr. Peterson from the rest of the firm's involvement in this litigation so that the firm need not be disqualified from continued participation in this litigation.

This motion to disqualify was argued before the Court on January 27, 1981. On February 27, 1981, an evidentiary hearing was held before the three active status judges of the Norfolk and Newport News Divisions of the Court sitting en banc.

Facts

In 1977 Neil R. Peterson was employed as Special Litigation Counsel in the Department of Justice. As Special Litigation Counsel, Peterson's duties were "to be generally involved with the coordination of the defense of asbestos litigation against the United States, and to personally undertaken [sic] the defense of one major

group of asbestos cases, the so-called 'Norfolk cases.'" (Affidavit of Neil R. Peterson p. 7). Mr. Peterson's affidavit states that, in the Norfolk cases, he was involved in litigating three types of cases: suits by civilian employees of the United States working at the Norfolk Naval Shipyard in Portsmouth, Virginia, against various manufacturers of asbestos who, in turn, impleaded the United States as a third-party defendant; suits by former members of the United States Navy or the Naval Reserve against various manufacturers of asbestos, who in turn impleaded the United States; and suits by employees of the Newport News Shipbuilding and Dry Dock Company against various manufactuers of asbestos who have in turn impleaded the United States as a third-party. In this last category, there are also direct actions filed by the plaintiffs against the United States. Mr. Peterson also

participated with defense counsel in several settlement negotiations and reached a settlement agreement in Glover v. Johns-Manville Corp., et al. v. United States.

At least as early as January 1980, Mr. Peterson began to negotiate for employment with a private firm. (Transcript of Hearing February 27, 1981, p. 69). Mr. Peterson left the Department of Justice on October 3, 1980, and on October 6, 1980, Mr. Peterson joined the law firm of Greitzer and Locks. Greitzer and Locks is a five-man firm (two partners and three associates) located in Philadelphia, Pennsylvania. Mr. Peterson is working for the firm as a salaried employee, or associate. The firm serves as co-counsel representing 260 of the 333 plaintiffs in the asbestos cases filed and pending in this Court and represents approximately 1500 plaintiffs in claims in various jurisdictions.

Although it was agreed at the outset of Peterson's association with the firm that Peterson would not participate in the Norfolk litigation, it is undisputed that Mr. Peterson was hired by Greitzer and Locks because of his expertise in asbestos litigation and with the understanding that he would participate in asbestos litigation in other courts.[1] The decision of the firm to bar Peterson from participating in the Norfolk litigation was made apparently on the grounds that such participation would violate Ethics in Government Act. 18 U.S.C. § 207(a)(1980),[2] and not

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[1]Greitzer and Locks apparently intended to bar Peterson from all Norfolk asbestos litigation handled by the firm without regard to whether the United States is a party to any specific action.

[2]18 U.S.C.A. § 207(a) prohibits a former government employee from acting as agent or attorney on a case or other particular matter involving specific parties in which the United States is a party or has a direct and substantial interest and in which he participated personally and substantially as a government employee.

because Peterson possessed any secrets or confidences of the Government. (Transcript of Hearing held on February 27, 1981, p. 158).

Mr. Peterson vigorously urges that, while serving as Special Litigation Counsel in the Department of Justice, coordinating the defense of asbestos litigation against the United States and personally defending the United States in the Norfolk cases, he did not gain or have access to any confidential information or secrets of the Government that would in any way aid any of the plaintiffs in the Norfolk litigation. More specifically, Peterson asserts that he has no "present" or "specific" recollection of any such information but that his "general" recollection of the information to which he was privy while employed by the Department of Justice is that the information would be of no litigative value to the plaintiffs. The various

"client" agencies of the Department of Justice disagreed as we shall later see.

In September 1980, Peterson notified the Government of his intent to participate in asbestos litigation upon his association with the firm of Greitzer and Locks and sought confirmation that his representation would pose no conflict in terms of his previous representation of the United States. In addition, Peterson requested a waiver of any imputed disqualification of the firm of Greitzer and Locks from continued participation in the Norfolk litigation provided that the firm complied with certain screening provisions. These screening provisions stated that Peterson:

(1) Could not directly work on the Norfolk cases.

(2) Could not advise them on any matters concerning those cases.

(3) Could not participate indirectly in those cases, by way of legal

analysis, taking or preparing for any discovery, advice or in any other way whatsoever.

(4) Could not be given access to any of the files.

(5) Could not share in any monies derived from those cases.

In response to Peterson's request for confirmation of his participation in various asbestos litigation, the Department of Justice circulated a letter to the various client agencies to determine whether any agency would object to Peterson's participation in actions against the United States in cases in which Mr. Peterson had had no personal or supervisory role while at the Department of Justice. Specifically, the Department was concerned that Peterson may have acquired privileged information about the agencies through the confidential attorney-client relationship. The Department of Health and Human Services responded on November 26, 1980, stating:

"Based on our lengthy association with Mr. Peterson in preparation for the defense of asbestos cases in which this Department is or may be a defendant we have the following concerns about Mr. Peterson's current activities:

> Mr. Peterson has had free and complete access to records of this Department regarding the effects of asbestos.
>
> He has had immediate and constant contact with employees of this Department who are experts in this area of science.
>
> In personal meetings and interviews with scientific employees of this Department, who will in all likelihood be witnesses in these cases, he has in many cases established a close working relationship and unique rapport. Thus, he has been able to assess the strengths and weaknesses of our position and to even formulate the manner in which the factual and scientific portion of the cases will be presented.

Consequently, we have serious reservations about the propriety of Mr. Peterson's continued activities in these cases because our collaboration with Mr. Peterson seems to warrant a conclusion that an attorney-client relationship existed between Mr. Peterson and possible witnesses in these cases who are employed by this Department.

Defendant's Exhibit 7.

The General Services Administration responded on December 3, 1980, stating:

> Mr. Peterson was Special Litigation Counsel for 3 years, approximately 2 of which he spent as coordinator of all asbestos litigation. In fact, Mr. Peterson states that he was "strategy coordinator of asbestos litigation against the United States." As such, his position would refute his statement that he has ". . .no 'inside' knowledge concerning any agency of the United States in relation to asbestos issues, either documentary or mental . . ."
>
> As "strategy coordinator," he would be privy to inside, special information, as well as, trial strategy used in the asbestos cases. Since most asbestos cases concern similar legal and factual issues, Mr. Peterson is knowledgeable on the strategy position that the Government presently takes and will probably take on all cases (whether or not Mr. Peterson personally handled them).

Defendants' Exhibit 6.

On December 4, 1980, the U.S. Department of Labor responded:

> [W]e know of no confidential information supplied to Mr. Peterson in connection with asbestos litigation. However, we cannot be positive that no such information was supplied. In any event, our concern would not be so much with specific cases as it would be with Mr. Peterson's knowledge,

> gained as a result of his employment with the Department of Justice, of the Government's tactics and strategy in asbestos litigation. We feel that Mr. Peterson must be as familiar with the Government's tactics and strategy, and its strengths and weaknesses, and what it can and cannot prove as anyone. It is our opinion that all of this must be considered in considering Mr. Peterson's request.

Defendants' Exhibit 9.

Based on these responses and its own evaluation of the situation, the Department of Justice had serious concerns that Peterson's participation on behalf of the firm in other asbestos litigation against the United States would either intentionally or through mere inadvertence erode the effectiveness of the proposed screen in the Norfolk and Newport News cases. It felt that if Peterson were to participate in litigation involving similar if not identical legal and factual issues present in the Norfolk litigation the "screen" may prevent him from communicating information to his new law associates about the Norfolk cases, however, the

screen would not prevent him from using and communicating the very same information in connection with the other similar cases. As a result, the Department expressly conditioned its granting of a waiver of disqualification of the firm upon the firm's promise to adopt procedures to screen Peterson from involvement in any cases where the United States was a party. Specifically, the Government required that Peterson be screened from and not participate in any way in any case in which the United States is, or may become, a direct defendant. In addition, the Department required that, in cases where the United States is or may become a third-party defendant, Peterson's participation be confined to those aspects of the plaintiffs' cases against the direct defendants and that Peterson be barred from participating in taking discovery from the United States, deposing or cross-examining

any Government witnesses or giving advice in such matters.

By letter of January 7, 1981, Mr. Rogovin as counsel for Mr. Peterson, acknowledged the concerns of the Government and agreed that these additional safeguards would be adopted by Peterson and the law firm. Based upon this promise to institute these additional safeguards, on January 9, 1981, the Department of Justice waived the imputed disqualification of the firm of Greitzer and Locks in the Norfolk litigation.

Discussion

The ethical standards relating to the practice of law in this Court are set forth in the American Bar Association Code of Professional Responsibility (ABA Code), see Local Rules of Practice, United States District Court of the Eastern District of Virginia, Rule 7(I); and it is the non-delegable responsibility of this Court to

see that lawyers practicing before this Court maintain the highest standards of professional conduct in the management of cases before it, and to insure that nothing, not even the appearance of impropriety, is permitted to tarnish the judicial process or shake the confidence of the public in the integrity of the legal profession. Kesselhaut v. United States, 555 F. 2d 791, 794 (Ct. Cl. 1977); Trone v. Smith, 621 F.2d 994, 999 (9th Cir. 1980); Schloetter v. Railoc of Indiana, Inc., 546 F. 2d 706, 710 (7th Cir. 1976); Hull v. Celanese Corp., 513 F. 2d 568, 571 (2d Cir. 1975); In re Gopman, 531 F. 2d 262, 266 (5th Cir. 1976); Richardson v. Hamilton International Corporation, 469 F. 2d 1382, 1385 (3rd Cir. 1972), cert. denied, 411 U.S. 986 (1973). Accordingly, any waiver filed by the Government is not binding upon this Court. See Kesselhaut v. United States, 555 F. 2d at 794. Indeed, without firm judicial support, the high

moral standards set out in the ABA Code would be "only reverberating generalities." Empire Linotype School v. United States, 143 F. Supp. 627, 633 (S.D. N.Y. 1966). Thus, it is the clear and independent duty of this Court to determine, after analyzing all of the circumstances in this matter in light of the goals of the Code of Professional Responsibility and the role of the legal profession in our society, whether the employment by Greitzer and Locks of Neil Peterson, who previously represented the United States in the Norfolk cases, requires disqualification of the law firm from further participation in Norfolk cases involving the United States.

Disciplinary Rule 9-101(B) states: A lawyer shall not accept employment in a matter in which he had substantial responsibility while he was a public employee. The policy considerations underlying the mandatory prohibition of DR 9-101(B) are

several: "The treachery of switching sides; the safeguarding of confidential governmental information from future use against the Government; the need to discourage Government lawyers from handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving Government service, and the professional benefit derived from avoiding the appearance of evil." American Bar Association Committee on Ethics and Professional Responsibility, Formal Opinion 342, p. 3-4 (November 24, 1975) (hereinafter Formal Opinion 342). The Ethical Consideration underlying DR 9-101(B) is that such conduct "would give the appearance of an impropriety even if none exists," EC 9-3, in violation of Canon 9 which provides that "A Lawyer Should Avoid Even the Appearance of Impropriety."

The law presumes that an attorney possesses all confidential information to

which he had access in his prior representation of a client, See Arkansas v. Dean Foods Products Co., 605 F. 2d 380, 384-85 (8th Cir. 1979), overruled on other grounds, In re Multi-Piece Rim Products Liability, 612 F.2d 378 (8th Cir. 1980); Schloetter v. Railoc of Indiana, Inc., 546 F.2d at 710; Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973); and this rule requiring attorneys to refrain from involvement in matters in which they had substantial responsibility while public employees recognizes the potential that exists for attorneys to disclose the confidences of former clients, in violation of the Disciplinary Rule of Canon 4, "A Lawyer Should Preserve the Confidences and Secrets of a Client." Requiring lawyers not to accept employment under these circumstances or disqualifying lawyers from participating in such matters "frees lawyers from the difficult task of erecting Chinese walls

in their own minds between what is confidential and what is not, and forwards the public's interest in maintaining the highest standards of professional conduct and the scrupulous administration of justice." Hull v. Celanese Corp., 513 F.2d at 569.

In a professional relationship, "[B]oth the lawyer and the client should expect that the lawyer will use every skill, expend every energy, and tap every legitimate resource in the exercise of independent professional judgment on behalf of the client and in undertaking representation on the client's behalf." Trone v. Smith, 621 F.2d at 998. Where the potential for disclosure of confidences exists, disqualification is required because, as stated by the Second Circuit in Emle Industries, Inc. v. Patentex, Inc., 478 F. 2d at 571:

> [A] lawyer's good faith, although essential in all his professional activity is, nevertheless, an inadequate safeguard when standing alone. Even the most rigorous self-

> discipline might not prevent a lawyer from unconsciously using or manipulating a confidence acquired in the earlier representation and transforming it into a telling advantage in the subsequent litigation. Or, out of an excess of good faith, a lawyer might bend too far in the opposite direction, refraining from seizing a legitimate opportunity for fear that such a tactic might give rise to an appearance of impropriety. In neither event would the litigants' or the public's interest be well served. The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case. These considerations require application of a strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage.

While employed as Special Litigation Counsel in the Department of Justice, Peterson personally defended the United

States in the Norfolk asbestos litigation. Clearly, Peterson is barred by DR 9-101(B) and 18 U.S.C.A. §207(a) from participating in the Norfolk litigation and no one contends that Peterson is eligible to participate personally in the Norfolk litigation involving the Government.

As stated before, Peterson adamantly maintains that despite his extensive involvement in the Norfolk cases and his involvement in coordinating the defense of all asbestos litigation against the United States, he has absolutely no "useful" or "inside" Government information that would be of any litigative value to the plaintiffs. More specifically, he states that he has no "present" or "specific" recollection of any such information but that his "general" recollection of the information to which he was privy while employed by the Department of Justice is that the information would be of no benefit to the plaintiffs, nor would

its disclosure disadvantage the Government. However, as noted above and explained below, it is the position of the Government that Peterson does possess some confidences or secrets of the Government which would in fact aid the plaintiffs in the Norfolk litigation to the detriment of the United States.

When Peterson left the Department of Justice and joined a private law firm which represents plaintiffs in asbestos litigation, the Government had serious concerns about Peterson's participating in cases where the United States was involved. The General Services Administration, the Department of Health and Human Services, and the Department of Labor had all expressed concern that Peterson either obtained or might have obtained confidential information concerning their agency while serving as an attorney for the Department of Justice. These concerns are not

frivolous since, as a result of an attorney-client relationship, a presumption arises that confidential communications have been exchanged. Arkansas v. Dean Foods Products Co., 605 F.2d at 384-385; Schloetter v. Railoc of Indiana, Inc., 546 F.2d at 710; Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562.

Based on the concerns expressed by the client agencies and its own evaluation of the situation, the Department of Justice conditioned the granting of the waiver of the law firm on Peterson's being screened from participating in cases where the United States was a party. Specifically, the United States was concerned that information Peterson might communicate to his law partners while participating in cases similar to the Norfolk cases would then be used by those partners in the Norfolk litigation.

Peterson and Greitzer and Locks concede that Peterson is barred by 18 U.S.C.A.

§ 207(a) from participating personally in the Norfolk litigation in which the Government is a party. This Court FINDS, however, that based on Peterson's prior representation of the Government and the express concerns of the Government that Peterson is disqualified from such representation by not only 19 U.S.C.A. § 207(a) but also DR 9-101(B) and the Disciplinary Rule of Canon 4.

Disciplinary Rule 5-105(D) states: If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate or any other lawyer affiliated with him or his firm, may accept or continue such employment. Disciplinary Rule 5-105(D) recognizes "the close, informal relationship among law partners and associates and upon the incentives, financial and otherwise, for partners to exchange information freely among themselves

when the information relates to existing employment." Formal Opinion 342, n.2. Because of the continuing danger that an attorney may unintentionally transmit information gained through the attorney's prior association due to the day-to-day contact an attorney has with other members of his firm, disqualification is required to guard against the possibility of inadvertent use of confidential information. See Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975), overruled on other grounds in Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980) (en banc). This disqualification is required without showing that an attorney possessed explicit confidences which were expressly transmitted to or received by the other members of the law firm during some conference, letter-drafting or phone conversation and is required whether or not the other members of the

firm are actually exposed to the information. Trone v. Smith, 621 F.2d at 999; see also Westinghouse Electric Corp. v. Kerr McGee Corp., 580 F.2d 1311 (7th Cir.), cert. denied, 439 U.S. 955 (1978); Schloetter v. Railoc of Indiana, Inc. 546 F.2d at 711; Handelman v. Weiss, 368 F. Supp. 258 (S.D.N.Y. 1973). The threat remains that the firm may have been tainted by the improper receipt of privileged information and it is the possibility of the breach of confidence, not the fact of the breach that triggers disqualification. Trone v. Smith, 621 F.2d at 999; see also Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980) (en banc).

Under DR 5-105(D) and Canon 9, a court must disqulify a law firm from continued representation where such representation constitutes a threat of taint to the integrity of the trial or where such continued representation

creates the appearance of impropriety. Armstrong v. McAlpin, 625 F.2d 433; Cheng v. GAF Corp., 631 F.2d 1052, 1058 (2d Cir. 1980); Board of Education v. Nyquist, 590 F.2d 1241 (2d Cir. 1979). The integrity of a trial may be tainted where a law firm is potentially able to use information which a former Government attorney gained in confidence while serving as a public employee and which was unavailable to the other side. Armstrong v. McAlpin, 625 F. 2d at 444.

Law firms have employed various methods of screening a possibly tainted attorney from the rest of the firm's involvement in a particular case in order to avoid the difficulties caused by an inflexible application of DR 5-105(D). The ABA stated in Formal Opinion 342 that the Government may waive the vicarious disqualification of a law firm where the Government is satisfied that a former

Government attorney is (1) effectively screened and isolated from any direct or indirect participation in the matter and (2) where there is no appearance of significant impropriety affecting the interests of the Government. However, despite a Government waiver, it remains the clear and independent duty of the Court to scrutinize the screening procedures and to disqualify the firm if the Court finds that, despite the attempted screening, continued representation constitutes a threat to the integrity of the trial or creates the appearance of impropriety. Furthermore, if, after evaluating the sufficiency of a proposed screen a court still harbors doubts as to the sufficiency of the screen, the court should resolve the issue in favor of disqualification. Cheng v. GAF Corp., 631 F. 2d at 1058; Hull v. Celanese Corp., 513 F.2d at 571; Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.,

607 F.2d at 189-90; IBM Corp. v. Levin, 579 F.2d 271, 283 (3d Cir. 1978).

Peterson and his firm, Greitzer and Locks, urge that their screening procedures, some of which were instituted before Peterson joined the firm and some of which were adopted over three months after Peterson joined the firm are sufficient to isolate Peterson from the rest of the firm's involvement in the Norfolk cases so as to remove any threat to the integrity of the trial or create any unacceptable appearance of impropriety. To repeat, the safeguards adopted by the firm provide that Peterson is not to work directly or indirectly on the Norfolk cases, that Peterson is not to have any access to any Norfolk litigation files and that Peterson is not to share in any income derived from the Norfolk litigation. The attorneys and staff in the firm have been instructed not to discuss any of the Norfolk cases

with Mr. Peterson either directly or within his earshot. In addition, Peterson and the firm have agreed that Peterson will not participate in any way and will be screened from substantive involvement and financial participation in cases in which the United States is or may become a direct defendant. Furthermore, where the United States is or may become a third-party defendant, Peterson will be confined to participation against the direct defendants only and will not participate in any aspect of the case, including discovery, relating to the involvement of the United States. In these cases, the firm will conduct a case-by-case review to determine whether Mr. Peterson should refrain from participating at all.

Peterson's employment with Greitzer and Locks constitutes a threat to the integrity of the Norfolk litigation despite the attempts of the firm to screen him from

any participation in the litigation. Peterson will be participating with other members of Greitzer and Locks in the trial or settlement of over a thousand asbestos cases in other jurisdictions. In addition, the Norfolk litigation in which Greitzer and Locks are co-counsel as of April 23, 1981, involves the claims of two hundred sixty (260) individual plaintiffs represented in seventh-eight (78) separate civil actions. Greitzer and Locks is a six-man law firm. These cases will take a considerable amount of time to litigate and, despite the protestations of Peterson and the firm, it is unclear how disclosures, even inadvertent, can be prevented given the size of the firm and the prolonged nature of the litigation. Because of the magnitude of the litigation, there is the continuing risk that the agreement not to talk with Peterson about the cases or speak near Peterson about the

cases will not be effective given the close, informal relationship which exists among law partners and associates, especially in a firm the size of Greitzer and Locks and the financial incentives which exist to discuss current employment.

In addition, it is undisputed that Peterson joined the law firm several months before securing from the Government a waiver of imputed disqualification. From October until early January, both Peterson and the firm were under the impression that Peterson was not barred from participating in other cases where the United States was a direct party. The Government granted the waiver conditioned upon the firm's agreeing to screen Peterson from any participation in such cases. However, prior to acquiring the waiver Peterson did in fact file a motion to appear in the New Jersey cases in which the United States was a direct defendant. Because of the lapse of time between accepting the employment and

securing the terms of the Government's waiver there exists the real possibility that improper communication did in fact pass between Peterson and his firm.

Furthermore, the screening proposition that Peterson limit his involvement to participation only against the direct defendants in cases where the United States is or may become a third-party defendant is unrealistic and does not recognize the subtle and complex dynamics of litigation. In addition, although the law firm has offered to completely screen Peterson out of these cases on a case-by-case basis where they feel it is necessary to do so, this would require the firm to make awkward determinations often on the eve of trial and in the face of serious financial considerations.

Furthermore, although Peterson is not to participate in any monies derived from the Norfolk litigation where the Government

is involved, the magnitude of the claims involved and the size of the firm make it highly speculative if not incredible to presume that Peterson would not participate directly or indirectly in any of the monies received by the firm. These Norfolk cases present the possibility of the firm's recovering settlements or judgments on two hundred twenty-three (223) (Government cases) individual claims. Any income derived from these cases is bound to be channeled into the capital improvement of the firm and the salaries of its employees, including Peterson. It is likely that any capital improvements in a six-man law firm will inure either directly or indirectly to the benefit of Peterson as one of the members of that firm. Thus, the circumstances surrounding this particular litigation and the size of the law firm preclude the effective shielding of Mr. Peterson from involvement in the monies derived

from the Norfolk litigation. While we are not rejecting screening procedures nor are we applying an inflexible rule, no case has been cited to this Court nor has this Court been able to find any case where screening has been approved where the litigation is of such a protracted nature and which plays such a prominent role in a law firm's activities as is here presented.

Not only is the integrity of the litigation threatened by Peterson's employment with Grietzer and Locks, but such employment also creates the unacceptable appearance of impropriety and, as noted earlier, the Court, in considering a motion for disqualification, must also consider the appearance of impropriety. The public understandably will see an appearance of impropriety where, despite the clear prohibition of the Code, Peterson changes sides in the middle of ongoing

litigation and his firm is allowed to continue its participation on the basis of the assurances that Peterson will not discuss the cases.

The public will judge the appearance of impropriety from a layman's viewpoint without an appreciation of a lawyer's obligation as an "officer of the court." Briefly restated, the following are the undisputed facts from which the public would gain an impression of the impropriety of the law firm's continuing in the Norfolk cases where the Government is a party:

(1) While having the responsibility of defending the United States against vigorous attacks by Greitzer and Locks, Peterson was negotiating with Greitzer and Locks for a job.

(2) Peterson accepted employment with the law firm and went to work with the firm before any agreement was worked out between the Government and the firm.

(3) Peterson worked with the firm for three months before waiver agreement was worked out.

(4) Peterson, after joining the firm, entered or tried to enter a case against the Government pending in New Jersey and would be presumed to have had some conversations within the law firm about that case.

(5) The 1500 plus claims of the plaintiffs being represented by Greitzer and

Locks involve many millions of dollars and the law firm's fees whether contingent or otherwise potentially involve millions of dollars.

The public not only could but very likely would conclude that a voluntary screening process with no possibility of independent monitoring would be breached. For the Court to approve the continuance of Greitzer and Locks in the Norfolk cases where the Government is a party would seriously compromise the public's perception of the integrity of this Court and shake the public's confidence in the administration of justice.

As set out above, despite the fact that a waiver was granted by the Government, it remains the duty of this Court to insure that lawyers observe the highest

standards of professional conduct in litigation before it and this is a duty owed to the parties, the public, and the members of the bar. Without questioning Peterson's integrity or the sincerity of his efforts to disassociate himself from the Norfolk litigation, the Court is not satisfied that, under the facts of this case, screening will be effective. Certainly the lay public cannot be expected to perceive the screening to be effective. Accordingly, the Court FINDS that continued participation by Greitzer and Locks in the Norfolk asbestos litigation where the Government is a party constitutes a threat to the integrity of the trial and creates the appearance of impropriety. Armstrong v. McAlpin, 625 F.2d 433; Cheng v. GAF Corp., 631 F.2d 1052; Board of Education v. Nyquist, 590 F.2d 1241.

The question remains whether Greitzer and Locks should be barred from those

Norfolk cases in which the Government is not a party. Rule 7(D), Local Rules of Court for the Eastern District of Virginia, provides that out-of-state counsel may, upon motion, be permitted to appear and conduct specific cases in association with a duly qualified member of the bar of this Court. Pursuant to this rule, Greitzer and Locks have associated two local counsel in all of their cases pending in the Newport News and Norfolk Divisions of this Court. As of April 23, 1981, Greitzer and Locks was associated with local counsel in thirty-seven cases where the Government is not a party. As yet there is no allegation that local associate counsel have been sufficiently exposed to Greitzer and Locks since Peterson's becoming a member of that firm to have received information which would bar them under the reasoning of Rule 5-105(D). The Court foresees, however, that if

Greitzer and Locks and its two local counsel continue to work together in the thirty-seven non-Government cases, the status of the local lawyers as counsel for all two hundred sixty plaintiffs will be jeopardized. It is important to the plaintiffs that this not happen.

In fulfilling its duty, this Court is not unmindful of the right of plaintiffs to retain counsel of their own choosing and the delays inherent in changing attorneys in the midst of complex litigation. However, as stated before, in the Norfolk cases, all of the plaintiffs are represented and have been represented since inception of their actions by able local counsel. The public does not have an absolute right to maintain any particular counsel, IBM Corporation v. Levin, 579 F.2d at 283; Kramer v. Scientific Control Corporation, 534 F.2d 1085, 1093 (3d Cir.), cert. denied, 429 U.S. 830 (1976), and the

right of the public to retain counsel of its choice is secondary in importance to the Court's duty to maintain the highest standards of professional conduct to insure and preserve trust in the integrity of the bar. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 519 F.2d at 757; Hull v. Celanese Corp., 513 F.2d at 569; see also Telos Inc. v. Hawaiian Telephone Co., 397 F. Supp. 1314 (D. Hawaii 1975). The courts must strike a reasonable balance between the public's right to freely chosen counsel and the court's duty to maintain the highest ethical standards. The Court must also act quickly to prevent local counsel from becoming subject to challenge. In this case, the Court believes the proper balance has been maintained by our decision.

For all the reasons stated in the Opinion, the Court FINDS that the law firm of Greitzer and Locks is DISQUALIFIED

from further participation in the Norfolk cases.

In order to minimize the burden which may fall upon the affected plaintiffs by virtue of removing part of their legal team in the middle of complex litigation, the Court notes that these cases are currently being held in abeyance pending guidance from the United States Court of Appeals for the Fourth Circuit and that this Court will allow such additional time as is deemed necessary in setting these cases for trial to permit remaining plaintiffs' counsel to thoroughly prepare their cases.

The Court acknowledges the hardship claimed by Greitzer and Locks in disqualifying it from participating further in the Norfolk litigation. This hardship quite properly rests with the firm which knowingly undertook the employment of an individual in the face of the Code's clear

prohibition, without first securing a Government waiver and seeking approval of the screening procedures from this Court. If the Court had been consulted prior to the employment, the Court would have reached the same conclusion but no loss would have occurred to Peterson or Greitzer and Locks.

Accordingly, the Court DISQUALIFIES Greitzer and Locks from further participation in the Norfolk cases.

It is so ORDERED.

/s/ John A. MacKenzie
United States District Judge

/s/ Richard B. Kellam
United States District Judge

/s/ J. Calvitt Clarke, Jr.
United States District Judge

May 6, 1981
Norfolk, Virginia

APPENDIX D

Current Law Conclusively Favors Appealability.

All Circuits considering the issue have determined that orders granting disqualification are appealable.

1. The First Circuit is one of only two circuits without even dicta on the issue. In In re Continental Investment Corp., 637 F.2d 1 (1980), in the process of concluding that orders denying disqualification are not appealable, the court noted in passing that other circuits had held that orders granting disqualification were appealable but did not reach the issue.

2. The Second Circuit, in Armstrong v. McAlpin, 625 F.2d 433, 440-441 (1980), vacated on other grounds, 449 U.S. 1106 (1981), held that orders granting disqualification were

appealable. In doing so, it noted that it had originally held orders denying disqualification were not appealable [Fleischer v. Phillips, 264 F.2d 515 (1959), cert. denied, 359 U.S. 1002 (1959)], had changed that rule to permit appeal of such denials (Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (1974), and there, based upon the experience of a number of cases and out of concern for the use of a disqualification motion as part of legal tactics, had reverted in Armstrong to holding denials non-appealable. The Second Circuit has continued to allow appeals of orders granting disqualification after this Court's decision in Firestone and Glueck v. Jonathan Logan, Inc., 653 F.2d 746 (1981).

3. The Third Circuit, like the First, has not even dicta. In In re Fine Paper Antitrust Litigation, 617

F.2d 22 (1980), it held orders denying disqualification non-appealable, but, without any decision, noted that there were reasons for distinguishing orders denying disqualification.

4. The Fourth Circuit, in Aetna Casualty & Surety Co. v. United States, 570 F.2d 1197, 1200 (1978), cert. denied. 439 U.S. 821 (1978) permitted on appeal of a disqualification, a decision followed by the panel below (Appendix B, p. 4). See also: MacKethan v. Peat, Marwick, Mitchell & Co., 557 F.2d 395 (1977).

5. The Fifth Circuit, post Firestone, allows appeals of orders granting disqualification. In re Corrugated Container Antitrust Litigation, 659 F.2d 1341 (1981); Duncan v. Merrill, Lynch, Pierce, Fenner & Smith, 646 F.2d 1020 (1981).

6. The Sixth Circuit, which had

ruled that orders denying disqualification were not appealable [Nelamed v. ITT Continental Baking Co., 592 F.2d 290, 295 (1979)], held that an appeal was available from an order granting disqualification. General Electric Co. v. Vabron Corp., 608 F.2d 265, 266 (1979), cert. denied, 445 U.S. 930 (1980).

7. The Seventh Circuit permits appeals from orders denying disqualification. Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706, 709 (1976); Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1313 (1978); cert. denied 439 U.S. 955 (1978).

8. The Eighth Circuit in the Firestone case held prospectively that orders denying disqualification were unappealable while holding that orders granting disqualification were

appealable. In re Multi-Piece Rim Products Liability Litigation, 612 F.2d 377 (1980).

9. The Ninth Circuit has said, after Firestone, that orders granting disqualification were appealable. In re Coordinated Pretrial Proceeding in Petroleum Products Antitrust Litigation, 658 F.2d 1355 (1981).

10. The Tenth Circuit permits appeals of denials of disqualification. Fullmer v. Harper, 517 F.2d 20, 21 (1975); State of New Mexico v. Aamodt, 536 F.2d 1102, 1106 (1976), cert. denied 429 U.S. 1121 (1977).

11. The United States Court of Appeals for the District of Columbia Circuit permitted an appeal of the granting of disqualification in In re Investigation Before April 1975 Grand Jury, 531 F.2d 600, 605, fn. 8 (1976). While this was a criminal case in which

it might be claimed that the right to counsel of choice by an accused has more protection, the Circuit noted no such distinction in differentiating a grant of disqualification from a denial when it later ruled that denials were not appealable. Community Broadcasting of Boston, Inc. v. FCC, 546 F.2d 1022, 1026 546 F.2d 1022, 1026 n. 22 (1976) fn. 22 (1976).

12. Finally, post Firestone, the United States Court of Customs and Patent Appeals has held an order granting disqualification to be appealable. Ah Ju Steel Co., Ltd. v. Armco, Inc., 680 F.2d 751 (1982).

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK & NEWPORT NEWS DIVISIONS

IN RE: ASBESTOS CASES CP 77-1

MOTION TO DISQUALIFY COUNSEL

The undersigned defendants, by counsel, move this Honorable Court for the entry of an Order disqualifying Neil R. Peterson, Esquire, and the firm of Greitzer & Locks, 1500 Walnut Street, Philadelphia, PA, from any further participation in these cases, and enjoining all other plaintiffs' counsel of record from any further communication, direct or indirect, with Greitzer & Locks and Mr. Peterson regarding these cases and asbestos-related matters. This motion is brought on the grounds that participation by Mr. Peterson and Greitzer & Locks constitutes a direct violation of the Code of Professional Responsibility of the American Bar Association, Canons 4, 5, and 9, Disciplinary Rules 9-101(B) and 5-105(D), as made applicable to attorneys practicing before this Court by Local Rule of

Practice 7(I). A supporting Memorandum of Law is filed simultaneously herewith.

Johns-Manville Corporation
Johns-Manville Sales Corporation
Raybestos-Manhatten, Inc.
Garlock, Inc., Precision Seal Division
Eagle-Picher Industries, Inc.
Unarco Industries, Inc.
Fibreboard Corporation
GAF Corporation
Armstrong Cork Company
H. K. Porter Company
Southern Textile Corporation
Pittsburgh Corning Corporation

By /s/ C. Michael Montgomery
Of Counsel for Johns-Manville Corporation and Johns-Manville Sales Corporation and per authorization of defendants as listed

APPENDIX

ABA Code of Professional Responsibility Provisions Involved

Canon 4

A Lawyer Should Preserve the Confidences and Secrets of a Client.

Canon 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client.

Canon 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety

Disciplinary Rule 5-105(A)

A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment or if it would be likely to involve him in representing different interests, except to the extent permitted under Disciplinary Rule 5-105(C).

Disciplinary Rule 5-105(D)

If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate, or any other lawyer affiliated with him or his firm may accept such employment.

Disciplinary Rule 9-101(B)

A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

APPENDIX G

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT LAW DIVISION

SHIRLEY KOSIK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	78 L 14725
	)	
JOHNS-MANVILLE PRODUCTS CORP.; RAYBESTOS-MANHATTAN; and UNARCO,	)	
	)	
Defendants.	)	

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable WALTER B. BIESCHKE, Judge of said court, on the 13th day of November, 1981, at the hour of 3:30 o'clock, P.M.

PRESENT:

MESSRS. LEWIS & DAVIDSON,
By: MR. W. JOSEPH HETHERINGTON,

on behalf of the Plaintiff;

MESSRS. PHELAN, POPE & JOHN,
By: MS. BARBARA HALPERN,

on behalf of the Defendant;
(Raybestos-Manhattan)

MESSRS. McKENNA, STORER, ROWE, WHITE & FARRUG,
By: MR. WILLIAM J. CORCORAN,

on behalf of the Defendant. (Unarco)

Kristine Peterson, CSR
Official Court Reporter
Richard J. Daley Center - 304
Chicago, Illinois

THE COURT: This is the matter of Kosik vs. Johns-Manville Products Corporation, et al., 78 L 14725. And this matter came on for ruling on the motion of the plaintiff for the admission of Gene Lock, pro hac vice, as additional trial counsel in this case for the plaintiff Shirley Kosik. And also as to ruling on the motion of the defendants to bar the admission of said Gene Lock pro hac vice.

And the court having heard the arguments of counsel before in this matter and having been favored with very able briefs by all parties in this matter rules that the motion of the plaintiff, Gene Lock to be admitted pro hac vice is granted.

The motion of the defendants to deny or bar his admission as counsel in this case pro hac vice is denied.

In this particular situation the court has thoroughly scoured the record, the affidavit and the memoranda that has been filed by all parties in this case. And one of the most significant determinations is that the situation of Mr. Peterson, who is an associate of Mr. Gene Lock, is significantly different in this litigation than what it was in the Norfolk group of cases involving extensive asbestosis litigation that Mr. Peterson had participated in personally in Virginia.

There in a great many of those cases, the United States was named as a third party. And in a very minor number also as a direct party defendant.

Here it has been amply demonstrated in the instant litigation that the United States is not presently involved and it

does not appear legally that it could be involved in this particular litigation.

Here the plaintiff decedent was an employee of the United States Navy. His exclusive remedy as to the United States lay under the Federal Employees Compensation Act. In addition, since there was no underlying tort cause of action against the United States on the part of the decedent by virtue of this exclusive provision of the Compensation Act, there could similarly be no third party cause of action brought against the United States. That is under the perculiar application of Federal law as enunciated in every one of the Federal District Circuits with the exception of the Fourth District which stands alone.

But on our own Seventh Circuit, Kudelka vs. American Hoist follows the lead case in Galimi vs. Jetco, Incorporated, which holds that there is no third party

cause of action that can be brought against the United States Government.

And in this litigation where you have the plaintiff decedent in the underlying original suit being an employee of the United States. And this is stated before because of the exclusivity of the Compensation Act.

Now, were the United States to be joined in the state court, of course, since the United States has not waived the sovereign immunity from case in tort, the matter would undoubtedly be transferred to the U.S. District Court. And under our Seventh Circuit case of Kudelka vs. American Hoist, and all of those cases involving all other circuits with the exception of the Fourth, it is clear that any attempt to join the United States as a third party defendant in the perculiar posture -- fact posture of this case would not succeed.

So you don't have in this litigation

the former employer of Mr. Peterson either involved directly or even as a third party defendant.

Now, it was one thing for Mr. Peterson to be disqualified in Virginia because he was there actively representing his former employer, the United States Government in all of that third party litigation.

But in this instant litigation you don't have that factor. His employer is not in this case. Even if his employer, former employer, the United States Government were attempted to be in this case it would be subject to a motion to dismiss. Which under the prevailing U.S. District Court law would very likely succeed.

I would say that the United States Government cannot, as this court perceives it, be a party to this law suit either directly or as a third party.

That takes us then to the question of whether or not when one balances the

interest between the right of the plaintiff here to choose her own lawyer as against the interest of seeing to it that there is no adverse affect upon the administration of justice flowing from the representation of counsel of plaintiff's own choosing, one then looks to see if as to the present defendants there was any compromise or would be any compromise of any confidential information that may have emanated from the present defendants to Mr. Peterson while he was trial counsel with the United States Government. And if so, whether there would be any imputation of such confidential information to any other member of the firm of Grigzer & Lock, and specifically Mr. Gene Lock.

The court has very carefully gone over the different areas that the defendants have cited. And concludes that the court is unable to find any specific instance where there was an exchange of confidential

information between Mr. Peterson and any defendant presently in this case that was involved in any prior litigation that Mr. Peterson was involved in.

For one thing it should be stated at the outset that Mr. Peterson never was an attorney for any one of these defendants. So that category of the case is not applicable here.

These defendants were never represented by Mr. Peterson. It is contended that some of these defendants may have been co-defendants with Mr. Peterson. And to that extent there may have been an exchange of information between said defendants and Mr. Peterson.

There is no specific case identified with the exception of the Glover case where there was any specific exchange of information between Mr. Peterson and the defendants.

First of all, the court notes that

while Mr. Peterson was with the Government, and that covered a period of approximately three years between 1977 and 1980, the first two years approximately were spent as a general co-ordinator wherein he had no direct trial personal participation in the litigation. And the last year or slightly in excess of the last year, he was personally involved in a series of cases known as the Norfolk litigation.

In -- By comparison a minuscule number of cases was he representing in that one year period the United States as a direct defendant. In the cases that were primarily concerned within the Norfolk were mainly adversarial third party litigation between the United States Government and actions brought by the defendants in those cases.

The Glover case was one of those adversarial third party suits brought by

a number of manufacturers against the United States as a third party defendant.

During the course of that litigation the point was raised that the plaintiff Glover in the underlying suit had obtained a settlement from the manufacturers for approximately $69,000. The manufacturers then sought to proceed against, as I indicated before, against the United States as a third party to recoup this amount of money.

The United States moved to dismiss on the grounds that the District Court had no jurisdiction under the Tucker Act for any amount in excess of $10,000 paid by any one of these individuals in that case, three manufacturing defendants who were third party plaintiffs.

The manufacturers allege on the other hand that none of them had paid more than $10,000 in settlement of the action. The trial judge in the case, in Glover third

party action, directed that the three defendants would disclose the amount that they paid to counsel for the third party defendant. Under the affidavit of Mr. Peterson that amount was disclosed.

He denies that he has any knowledge as to what the individual amounts were but he does recall that it did confirm the contentions of the third party plaintiffs that no one of them paid more than $10,000. And the case proceeded to a trial on the merits. And apparently the United States Government prevailed on the merits.

An examination of that record really doesn't disclose that there was information of such a confidential nature as far as this court perceived it, that has any substantial relation to the litigation in the instant case.

The affidavit of Mr. Peterson fully sets it out under oath as to what the circumstances were and how that was perculiarly

applicable for consideration under the then existing Virginia law which he has since indicated has been changed regarding the affect of releases of joint tort feasors in the State of Virginia.

And I really fail to see how that particular set of circumstances is such confidential information in any way which is going to adversely affect the administration of justice by having an associate of Mr. Peterson being an additional counsel in this particular instant litigation.

Apart from that one specific case no specific identifiable case has been cited by the defendants herein. No particular specific affidavit from any of the tiral counsel of all of the cases wherein the United States was involved and who had either been co-defendant of the United States or had opposed the United States in third party litigation was filed identifying or pointing out the existence or

the possibility of there being any confidentia information that might be considered detrimental to any defendant in subsequent litigation with the exception of what the court has already eluded to in the Glover case.

There has been general allegations about the United States being privied to proprietary information supplied by manufacturers to the United States Bureau of Medicine and Surgery. Examination of Mr. Peterson's affidavit, page 10, adequately explains that there was no -- that he was not privied to any such information, all though that certain manufacturers may have disclosed certain information to certain agencies of the United States Government. That never came to the personal knowledge or assimilation of Mr. Peterson or any showing that it was ever used in any litigation against any such manufacturer.

The allegations with regard to the fact that at one point the Government and certain manufacturers jointly interviewed Government employees at the Norfolk naval shipyard. Really when you inspect that it appears to be innocuous as far as there being any exchange of confidential information that Mr. Peterson obtained thereby.

This was simply a joint agreement between the United States Government and the manufacturers that they could interview any of the Government employees at the Norfolk naval shipyard is under certain guidelines and that there would be no stenotyping or transcribing of the interviews taken at the time.

And there has been no showing that--of any one of those interviews anything was conveyed to Mr. Peterson that would be a matter of any substantial detriment or any detriment to the manufacturers in this particular situation. Nothing has

been identified in that regard.

Now, I am sure that had there been during the course of those cases where Mr. Peterson personally participated as trial counsel, any divulgement of something confidential to him in those few cases where the United States was a co-defendant, whereby it could be said that he was a counsel for a co-defendant of a client, namely, the United States who was then a co-defendant of those defendants who are now in the instant litigation was any way confidential and prejudicial to the defendants or to be disclosed to the plaintiff in those underlying law suits and which is such information that he was carrying with him in the trial of this instant litigation. I am sure that there would have been an affidavit or evidence presented documenting what that particular alleged confidential information from these other cases may have been.

But it has not been identified at all in this record, and I am sure that Mr. Peterson must have encountered and dealt with a number of different trial counsel representing co-defendant among whom we now have certain defendants in the instant case.

Yet there has been no singling out, no showing whatsoever that anything of that nature was presented to Mr. Peterson.

There are broad brush stroke allegations in the briefs that as co-ordinator he became aware of the strategies that--the tactics and so forth of the manufacturing defendants. But really what he became aware of would be nothing more as the court determines than what anybody else would become aware of by extrapolating all of the discovery information that exist in these particular cases.

If one goes through any number of this type of case wherein the United States was

involved, you begin to see perhaps a general modus operandi or a general pattern perhaps of tactics or of strategy. But there has been no precise identification such as the court would have to see of what specifically was disclosed to Mr. Peterson during his employment with the United States Government which would fairly be said to say or to amount to a breach of any fiduciary obligation that you can argue that he may have owed a co-defendant.

Because that is the most that you--the closest that you can get to with regard to Peterson's relationship to the defendant in the instant case. He never was an attorney for them. In all but a bare handful of cases was he ever anything other than an adversary. Usually always third party litigation.

In those cases that Mr. Peterson has identified where the United States Government was a defendant, he described per-

culiarities of those cases and where they were filed and how the United States was dismissed out in those cases where they were named as a direct defendant.

There just is not any factual documentation as to confidential information that was ever exchanged with Mr. Peterson.

And so I specifically make that a factual finding that no contention of anything of a confidential nature that would be to the detriment of these defendants was ever exchanged between any of the defendants or their counsel in the instant case and Mr. Peterson while he was employed with the United States Government. And certainly the information he did obtain would be discernible or extrapolated from the pleadings in all of those cases just from all of the discovery that was filed in those various cases.

And I don't see that there is any substantial relationship between those

cases as far as the information that did come into the possession of Mr. Peterson and the present litigation.

So again it gets down to the final point that the focus of this court is a balancing of those interests between having a plaintiff in this asbestos litigation choose the counsel of her choice contrasted with the interest on the other hand of this court and society in general that there be a proper administration of justice. I quite frankly, for the reasons stated, do not find that the later interest has been affected or will be affected adversely by the admission of Mr. Lock as an additional counsel for the plaintiff herein. And accordingly the court does allow Mr. Gene Lock to be admitted as trial counsel in this case, or to participate as counsel in this case pro hac vice. And denies the motion of the defendant that he be barred thereby.

Thank you. That concludes the record.

(Which were all the proceedings had at the hearing of said cause.)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS - COUNTY DEPARTMENT - LAW DIVISION

I, KRISTINE PETERSON, an Official Court Reporter for the Circuit Court of Cook County, Illinois, County Department-Law Division, do hereby certify that I reported in stenotype the proceedings had at the hearing of the aforementioned cause; that I thereafter caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript of the proceedings had before the Honorable WALTER B. BIESCHKE, Judge of said Court.

Official Court Reporter

Dated this 19th day
of November, 1981.

APPENDIX H

DEPARTMENT OF THE NAVY
Office of the General Counsel
3 December 1980

OGC/LD/MA:lkb

John J. Farley, III, Esquire

Director, Torts Branch

Civil Division

Department of Justice

Washington, DC 20530

Re: Asbestos Litigation

Dear Mr. Farley:

This is in reply to the letter of Mr. Chavkin, Special Assistant to the Assistant Attorney General, Civil Division, dated October 30, 1980, relating to the possible conflict of interest problems that may arise from the fact that Mr. Neil Peterson, who represented the Government in various asbestos litigation, has left the Department and is associated with the firm of Greitzer and Locks, Philadelphia, whose primary orientation is in the personal injury and workmen's compensation fields, particularly in the representation of persons with asbestos-related diseases.

In the 30 October letter, there were enclosed two requests for ethical guidance which Mr. Peterson submitted to the Justice Department on September 10 and 30, 1980. You have asked us not to make copies of Mr. Peterson's submissions but to return them to the Department when we have completed our review. Accordingly, these documents are returned herewith.

Mr. Peterson lists, among other things, those asbestos cases where the United States was either a defendant or third party defendant in which he had personal and substantial participation including supervision of subordinate attorneys, and asks the Department of Justice to confirm his understanding that the Department has no objection to his use in future litigation of general knowledge which he acquired in the representation of the United States or its employees. In that connection, he represents that --

"to the best of my present recollection, I have no 'inside' knowledge concerning any agency of the United States in relation to asbestos issues, either documentary or mental, all knowledge such as I have being in the public realm as a result of discovery proceedings."

We have talked to the principal Navy officers and employees whom Mr. Peterson interviewed, and we are satisfied that his above representation of no 'inside' knowledge is correct.

We also note that in the Virginia litigation in which the firm of Greitzer and Locks are participating in current litigation, the firm will comply with the following "shielding" provisions.

(a) He will not directly work on those cases,

(b) He will not advise the firm on any matters concerning these cases,

(c) He will not participate indirectly in those cases by way of legal analysis, taking or preparing

for any discovery, advice or in any way whatsoever,

(d) He will not be given access to any of the files, and

(e) He will not share in any monies derived from those cases.

We have no objection to this "shielding" arrangement for the Virginia cases.

We are not clear whether this "shielding" arrangement is to apply to all cases in which Mr. Peterson had personal and substantial participation including those in which he supervised subordinate attorneys.

Accordingly, we must reserve any objections that we may have with respect to Mr. Peterson's participation in such cases, until we are advised on a case-by-case basis, the extent to which he will participate in such ongoing litigation. We must similarly reserve our objections with respect to any new cases which

involve present or former employees of naval shipyards and ask to be advised on a case-by-case basis of the nature and extent of Mr. Peterson's participation in those cases.

Sincerely yours,

PATRICK J. GNAZZO

Director

APPENDIX I

DEPARTMENT OF THE NAVY
Office of the General Counsel
Washington, D. C. 20360
30 January 1981

OGC/LD/MA:lkb

John J. Farley, III, Esquire
Director, Torts Branch
Civil Division
Department of Justice
Washington, DC 20530

Dear Mr. Farley:

Your letter of January 23, 1981, advises of the disposition of the disqualification questions raised by Neil R. Peterson's leaving the Department to join the firm of Greitzer & Locks, who are engaged in substantial asbestos litigation. The Waiver of Disqualification document and the exchange of correspondence noted in your letter, would in our opinion, fully protect the interests of the Navy in the ongoing and future asbestos litigation.

We shall, of course, advise you of any circumstances relating to this matter

should we encounter them in the course of preparing for current or future asbestos litigation.

Sincerely yours,

Patrick J. Gnazzo
Director

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
Norfolk - Newport News Divisions

IN RE ASBESTOS CASES C/P 77-1

WAIVER BY THE UNITED STATES
OF ANY IMPUTED DISQUALIFICATION
OF THE FIRM OF GREITZER & LOCKS

The United States of America waives any disqualification by imputation of the law firm of Greitzer & Locks in this litigation.

Neil R. Peterson, Esquire, presently associated with the firm of Greitzer & Locks and a former Special Litigation Counsel in the Civil Division of the United States Department of Justice, is personally disqualified from participating on behalf of plaintiffs in this litigation by virtue of his prior representation of the United States. In September, 1980, Mr. Peterson advised the Civil Division of his intention to depart from the De-

partment of Justice and to join the firm of Greitzer & Locks and he noted his personal disqualification from certain litigation, including these cases. He further represented that his firm was prepared to screen him from participation and remuneration in the Norfolk and Newport News litigation and requested the Department of Justice to waive any imputed disqualification of his new firm in this litigation.

To evaluate the extent of Mr. Peterson's personal disqualification and the effectiveness of the proposed screening provisions, the Civil Division initiated contact with, and sought the views of, the client agencies involved in all asbestos litigation handled and supervised by Mr. Peterson while he was an employee of the Department of Justice. In addition, the Civil Division conducted a detailed review of Mr. Peterson's activities. This entailed an extensive file review, additional consultation with

the client agencies, and interviews with Department of Justice attorneys who worked with and for Mr. Peterson.

Upon completion of this review in December, 1980, the Civil Division sought the guidance of the Office of Legal Counsel of the Department of Justice, which is responsible for giving "guidance and assistance . . . in matters relating to ethical conduct, particularly matters subject to the provisions of the conflict of interests laws." (28 C.F.R. Section 0.25(k)). On January 6, 1981, the Office of Legal Counsel advised the Civil Division that the waiver decision was the responsibility of the Civil Division. It also indicated that the Department favors waivers in cases where the former employee will be effectively and completely screened by the firm. With respect to Greitzer & Locks' continued participation in the Norfolk and Newport News cases, the Office of Legal Counsel expressed concern that

Mr. Peterson's continued participation on behalf of the firm in other asbestos litigation against the United States could, either intentionally or through mere inadvertence, vitiate the effectiveness of the proposed screen in the Norfolk and Newport News cases.

By letter dated January 7, 1981, a copy of which is attached as Exhibit "A", Mr. Peterson and the firm, through counsel, committed themselves to a course of action that alleviated the concerns expressed by the Office of Legal Counsel, the Civil Division and the client agencies. In essence, Mr. Peterson and his firm have agreed to implement and maintain a program under which Mr. Peterson will not participate in any way and will be screened from substantive involvement and financial participation in cases in which the United States is or may become a direct defendant. If the United States should be named as

a third-party defendant in asbestos litigation from which Mr. Peterson is not otherwise disqualified, his role in such cases will be confined to participation against the direct defendants only; he will not participate in any aspect of the case, including discovery, relating to the involvement of the United States; and even these cases will be subject to a case-by-case review in order to determine whether Mr. Peterson should refrain from participation to insure the effectiveness of screening arrangements which exist in these and other cases.

Based upon the commitment summarized above, the Assistant Attorney General for the Civil Division waived any imputation of Mr. Peterson's personal disqualification to the firm of Greitzer & Locks in the Norfolk and Newport News cases and so advised counsel by letter dated January 9, 1981, a copy of which is attached as

Exhibit "B".

ALICE DANIEL
Assistant Attorney General
Civil Division

JUSTIN W. WILLIAMS
United States Attorney

JOHN J. FARLEY, III
Director, Torts Branch
Civil Division
U.S. Department of Justice
Washington, D.C. 20530
Telephone: 202-724-6805
Attorneys for United State

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK & NEWPORT NEWS DIVISIONS

JAMES T. OMAN, FRED R. WALKER, HUGH V. REYNOLDS, and WILLIE A. GIBBONS, Plaintiffs,	:	CIVIL ACTION NO. 82-22-NN
v. JOHNS-MANVILLE CORP., et al, Defendants.	:	AFFIDAVIT OF JAMES T. OMAN FRED R. WALKER, HUGH V. REYNOLDS, and WILLIE A. GIBBONS

STATE OF VIRGINIA,
CITY OF NEWPORT NEWS, to-wit:

The undersigned, being first duly sworn, make oath as follows:

1. We are Plaintiffs in the above-captioned lawsuit.

2. We are personally acquainted with Gene Locks and personally approved his selection to be associated as a specialist in such matters in the trial of our case against asbestos manufacturers,

in association with our local attorneys, Robert R. Hatten and Richard S. Glasser.

3. We observed Mr. Locks in his preparation for the original trial, and in his management of that trial. We are completely satisfied with his representation of our interests, and feel that he is totally dedicated to us, and is an invaluable member of the team of attorneys representing us.

4. We are aware that the agreed fee for our attorneys is 40%, but we feel that our attorneys, especially Mr. Locks, who have worked for over six years to prosecute these complicated cases, will have earned every cent of their fee if we are successful in these trials. Mr. Locks has represented us since the fall of 1976, and from that time to the present he has been opposed by approximately ten different law firms representing some of the ablest lawyers in Virginia. If we are successful,

he must share his fee with my other attorneys, Robert R. Hatten, Joel Klein, and Richard Glasser, and Mr. Locks' percentage of the proceeds of my recovery will be 7% or less. Because the issues in the appeal of our case affected many other cases, our attorneys long ago voluntarily waived the additional 5% fee originally agreed for an appeal.

5. While we admire and respect our local lawyers, we know they have depended heavily on Mr. Locks to handle certain parts of the case, as was desired and intended by us. They and we will be greatly handicapped if he cannot help try our case at the new trial. We request the Court to wait until June 14, 1982, or after, to start our trial, in the hope that Mr. Locks can participate.

Given under my hand this 9th day of April, 1982.

JAMES T. OMAN

FRED R. WALKER

HUGH V. REYNOLDS

WILLIE A. GIBBONS

Subscribed and sworn to before me on the date last above written in my said city.

Notary Public

My Commission Expires:

APPENDIX L

U.S. DEPARTMENT OF JUSTICE
Civil Division

25 May 1982

Robert C. Nusbaum, Esquire
Hofheimer, Nusbaum, McPhaul & Brenner
1010 Plaza One
Post Office Box 3508
Norfolk, Virginia 23514

Re: Greitzer & Locks v.
Johns-Manville Corporation
(4th Cir.)

Dear Mr. Nusbaum:

I must decline your suggestion that the Justice Department monitor and investigate the screening arrangements at Greitzer & Locks. As I am sure you will understand, we cannot commit our limited resources to monitoring the affairs of former government attorneys who enter private practice, even when they become involved in disqualification litigation. Moreover, such an investigation here might tend to suggest

that we lack confidence in our original decision to waive disqualification of Greitzer & Locks. That decision was based on the presumption that Mr. Peterson and Greitzer & Locks would implement their screening commitment in good faith, a presumption that still holds.

I appreciate your concern that the en banc court of appeals have the benefit of full information in deciding this case. Our amicus brief fully sets forth the United States' position, however, and there is nothing we would add to that brief at this time.

Please feel free to contact us again if you have any questions.

Sincerely,

J. PAUL McGRATH
Assistant Attorney General
Civil Division

APPENDIX M

EXCERPT FROM BRIEF OF THE UNITED STATES AS AMICUS CURIAE GREITZER & LOCKS, et al., v. JOHNS-MANVILLE CORP., et al. NO. 81-1379

The law firm joined by a departing Justice Department attorney is expected to submit a letter to the head of the appropriate office or division of the Department identifying matters in the firm which the former government attorney was involved while in government, explaining the screening measures taken in insulating the attorney from involvement in such matters, and requesting the Department official's consent to the firm's handling of the matters. The Department's Office of Legal Counsel, which has responsibility for ethical concerns in the Department, 28 C.F.R. 0.25(k) and 45.735-26(b), is available for consultation with various components of the Department with respect to such requests.

After appropriate review, waiver requests are ordinarily granted if the reviewing official is satisfied that the screening procedures are adequate and that there is no residual appearance of significant impropriety affecting the interests of the government. Only where there would be some unique appearance of a conflict of interest that would not be adequately dispelled by screening would the Department decline to waive the imputed disqualification of the entire law firm. Such an occasion might arise, for example, if the law firm had failed to adopt a screening mechanism at the outset and the former government attorney had already participated in the matter while in the firm. Other possible situations where a waiver would not be granted would include: cases where the ex-government attorney had revealed government confidences; cases where there is evidence that the former

government attorney was responsible for inducing the private client to retain the law firm in connection with the case; and cases where the private firm hired the government attorney in order to remove him from a position of effectiveness in the government with respect to the case.

In this regard, it should be emphasized that the waiver approach approved by the ABA and followed by the Department serves the salutary purpose of forcing the law firm, the individual former government attorney in the law firm, and the government official responsible for ruling on the waiver request to focus on the specific question of the attorney's and the firm's disqualification. The former waiver request and response underscore the solemnity

of the screening mechanism.[6/] Also, if the letter sent to the Department requesting a waiver were false in any material respect with regard to screening measures the firm represents it has undertaken or will take, those responsible could be prosecuted under 18 U.S.C. § 1001 for making a false statement to the government. Moreover, if the individual attorney or his law firm failed to abide by the screening procedures, they would

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6/ If a government agency arbitrarily or capriciously declined to waive the imputed disqualification of the entire law firm notwithstanding adequate screening of the individual former government attorney, judicial relief would be available in the appropriate case. Kesselhaut v. United States, supra, 555 F.2d at 794. Similarly, where, as here, the government agency consents to the law firm's participation, another party to the litigation could request the court to review the agency's waiver determination and disqualify the law firm if that determination was found to be arbitrary and capricious and if some unique impropriety affecting the litigation were present. In both situations, of course, the determination by the agency concerned -- in effect the lawyer's former client -- is entitled to considerable deference, but we do not suggest that the waiver determination would be wholly beyond judicial review.

be guilty of serious ethical violations that could affect their professional reputations and their ability to practice law. These are important safeguards to the integrity of the screening process.7/

7/ Aside from the Department of Justice and the ABA, Congress has expressed concern that an overly stringent rule imputing an ex-government employee's disqualification to his entire firm would impair the government's recruitment of high-quality talent. Thus, in 1962, Congress declined to enact a proposal (H.R. 8140, § 207(c)) that would have imposed a harsh imputation rule on former government employees and their firms. The Department of Justice had opposed this proposal on the ground that it would make if difficult for a person with specialized experience to leave the government and enter into private activities in his field. See Hearings on H.R. 8140 before the Senate Comm. on the Judiciary, 87th Cong., 2d Sess. 21-22 (1962) More recently, congressional committees considering conflict of interest legislation have expressed similar concerns. See S.Rep. No. 95-170, 95th Cong., 1st Sess., at 32 (1977) ("There can be no doubt that overly stringent restrictions have a decidedly adverse impact on the government's ability to attract and retain able and experienced persons in federal office"). See also H.R. Rep. No. 96-115, 96th Cong., 1st Sess., at 3-5 (1979).

Appendix N

EXCERPT FROM ABA KUTAK COMMISSION REPORT

RULE 1.10.

USE OF INFORMATION TO THE DISADVANTAGE OF A FORMER CLIENT IN VIOLATION OF RULE 1.9.

(c) SUBJECT TO THE LIMITATIONS OF RULE 1.7, A DISQUALIFICATION PRESCRIBED BY THIS RULE MAY BE WAIVED BY THE CONSENT OF THE AFFECTED CLIENT AFTER DISCLOSURE.

*** *** ***

RULE 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

(a) EXCEPT AS LAW MAY OTHERWISE EXPRESSLY PERMIT, A LAWYER SHALL NOT REPRESENT A PRIVATE CLIENT IN CONNECTION WITH A MATTER IN WHICH THE LAWYER PARTICIPATED PERSONALLY AND SUBSTANTIALLY AS A PUBLIC OFFICER OR EMPLOYEE, UNLESS THE APPROPRIATE GOVERNMENT AGENCY CONSENTS AFTER DISCLOSURE.

(b) A LAWYER SERVING AS A PUBLIC OFFICER OR EMPLOYEE SHALL NOT:

(1) PARTICIPATE IN A MATTER IN WHICH THE LAWYER PARTICIPATED PERSONALLY AND SUBSTANTIALLY WHILE IN PRIVATE PRACTICE OR NONGOVERNMENTAL EMPLOYMENT, UNLESS UNDER APPLICABLE LAW NO ONE IS, OR BY LAWFUL DELEGATION MAY BE, AUTHORIZED TO ACT IN THE LAWYER'S STEAD IN THE MATTER; OR

(2) NEGOTIATE FOR PRIVATE EMPLOYMENT WITH ANY PERSON WHO IS INVOLVED AS A PARTY OR AS ATTORNEY FOR A PARTY IN A MATTER IN WHICH THE LAWYER IS PARTICIPATING PERSONALLY AND SUBSTANTIALLY.

(c) IF A LAWYER IS DISQUALIFIED BY PARAGRAPH (a), NO LAWYER IN A FIRM WITH WHICH THAT LAWYER IS ASSOCIATED MAY UNDERTAKE OR CONTINUE REPRESENTATION IN THE MATTER UNLESS:

(1) THE DISQUALIFIED LAWYER IS SCREENED FROM ANY PARTICIPATION IN THE MATTER AND IS APPORTIONED NO PART OF THE FEE THEREFROM; AND

(2) WRITTEN NOTICE IS PROMPTLY GIVEN TO THE APPROPRIATE GOVERNMENT AGENCY TO ENABLE THE AGENCY TO ASCERTAIN COMPLIANCE WITH THE PROVISIONS OF THIS RULE.

COMMENT: *** *** ***

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers

as well as to maintain high ethical standards. The provisions for screening in paragraph (c) and waiver in paragraph (a) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. *** *** ***

Paragraph (c)(1) does not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. It prohibits directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

NOTES:

Code Comparison

Rule 1.11(a) is similar to DR9-101 (B), except that the latter uses the terms "in which he had substantial responsibility while he was a public employee."

*** *** ***

With regard to Rule 1.11(c), an approximate counterpart is found in DR5-105(D), which provides that "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment." There is no counterpart in the Code to the screening provision of Rule 1.11(c).

Legal Background

Paragraphs (a) and (b): This Rule supplements restrictions on successive representation stated in Rule 1.9. "The purpose most often ascribed to the limitation on former government attorneys is to avoid the manifest possibility that a former government lawyer's action as a public official might be influenced (or open to the charge that it had been influenced) by the hope of later being

employed privately to uphold or upset what he had done." Woods v. Covington County Bank, 537 F.2d 804, 814(5th Cir. 1976) (quoting ABA Formal Opinion 37 (1931)). The restrictions also respond to the concern that a former government lawyer may obtain unjust advantage over an adverse private party as a result of access to information concerning that party which could be obtained only by use of public resources available during tenure in public office. Handleman v. Weiss, 368 F. Supp. 258 (S.D.N.Y. 1973); Allied Realty v. Exchange Nat'l. Bank, 283 F. Supp. 464 (D. Minn. 1968); Hilo Metals Co. v. Learner Co., 258 F.Supp. 23 (D.Hawaii 1966); ABA Formal Opinion 135 (1935). Thus, a former government lawyer may be prohibited from representing private parties in a related matter even though it is not adverse to the government. See Woods v. Covington County

Bank, 537 F.2d 804(5th Cir. 1976); ABA Formal Opinion 37 (1931); ABA Formal Opinion 135 (1935).

Although maintaining public confidence in the government is an important consideration, the rules must not unnecessarily prejudice the government lawyer, deprive private litigants of their right to counsel of their own choosing, impede recruiting efforts by the government or impinge upon the government's own assessment of the extent to which its employees should be limited in future employment. See Fletcher, "Conflict of Interest and the Former Government Employee: Rethinking the Revolving Door," 14 Creighton L. Rev. 707 (1980); Lacovara, "Restricting the Private Practice of Former Government Lawyers," 20 Ariz. L. Rev. 369 (1978); Morgan, "Appropriate Limits on Participation by a Former Agency Official in

Matters Before an Agency," 1980 Duke L.J. 1.

Under the Code, concerns arising from the employment of former government lawyers are addressed in DR 9-101. Some courts have also employed the language of Canon 9 and the heading of DR 9-101 to establish the "appearance of impropriety" as a substantive test in disregard of the specific standards set forth in the Code. E.g., Alpha Inv. Co. v. City of Tacoma, 536 P.2d 674 (Wash. Ct. App. 1975); cf. Kramer v. Scientific Control Corp. 534 F.2d 1085 (3rd Cir.), cert. denied, 429 U.S. 830 (1976) (private practice). See generally Kramer, "The Appearance of Impropriety Under Canon 9: A Study of Federal Judicial Process Applied to Lawyers," 65 Minn. L. Rev. 243 (1981). A number of courts, however, have stated that "the possible appearance of impropriety is simply too slender a

reed on which to rest...particularly... where...the appearance of impropriety is not very clear." Armstrong v. McAlpin, 625 F.2d 433, 445 (2d Cir. 1980) (en banc), vacated, 49 U.S.L.W. 3514(1981) (quoting Board of Educ. v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979)). Accord, ABA Formal Opinion 342 (1975). Compare Kramer v. Scientific Control Corp., 534 F.2d 1085 (3d Cir.), cert. denied, 429 U.S. 830 (1976).

Rule 1.11 eliminates the term "appearance of impropriety" and sets forth more specifically the circumstances in which concern for public confidence in government necessitates disqualification of a government lawyer. See generally Lacovara, supra; Morgan, supra; Note, "Ethical Problems for the Law Firm of a Former Government Attorney: Firm or Individual Disqualification?" 1977 Duke L.J. 512; Note, "Conflicts of

Interest and the Former Government Attorney," 65 Geo. L.J. 1025 (1977); Note, "The Chinese Wall Defense to Law Firm Disqualification," 128 U.Pa.L.Rev. 677(1980).

*** *** ***

The direct disqualification of a former government lawyer under paragraph (a) may be waived by the former agency in proper circumstances. Waiver may be in the public interest. See Woods v. Covington County Bank, 537 F.2d 804 (5th Cir. 1976); General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974).

*** *** ***

Paragraph (c): A growing number of authorities recognize that imputed disqualification of a firm is a harsh remedy that the screening can adequately protect public confidence, the interests of the former government lawyer, and the interest of private litigants in selecting counsel of their own choosing. See Arm-

strong v. McAlpin, 625 F.2d 433 (2d Cir. 1980)(en banc), vacated, 49 U.S.L.W. 3514 (1981); Kesselhaut v. United States, 555 F.2d 791 (Ct. Cl. 1977); ABA Formal Opinion 342 (1975); N.Y. Opinion 889, reprinted in 31 Record 552 (1976); Wiley, "Speaking Out Against Ethics Committee Inquiry 19," Dist. Law. 35 (Winter 1976); Note "Screening To Rebut the Automatic Law Firm Disqualification Rule," 82 Dick. L.Rev. 625 (1978); Comment, "Conflicts of Interest and the Former Government Attorney," 65 Geo. L.J. 1025 (1977); Comment, "The Chinese Wall Defense to Law Firm Disqualification," 128 U. Pa. L.Rev. 677 (1980).

With respect to the nature of the screening required see, Armstrong v. McAlpine, 625 F.2d 433 (2d Cir. 1980) (en banc), vacated, 49 U.S.L.W. 3514 (1981). Judicial scrutiny of a screening mechanism may be necessary to assure com-

plicance with the provisions of this Rule. See Armstrong v. McAlpine, 625 F.2d 433; Note, "Ethical Problems for the Law Firm of a Former Government Attorney: Firm or Individual Disqualification?" 1977 Duke L.J. 512; Comment, "Conflicts of Interest and the Former Government Attorney," 65 Geo. L.J. 1025 (1977).

Consent of the affected government agency is not necessary under paragraph (c), for such a requirement would provide agencies with unregulated discretionary power. Kesselhaut v. United States, 555 F.2d 791, 794 (Ct. Cl. 1977). The agency is entitled to notice and an opportunity to determine compliance with paragraph (c). However, the former government client is also protected by Rule 1.9 and must consent to any adverse representation in substantially related matters, see United States v. Kitchin, 592 F.2d 900 (5th Cir. 1979), as well as to any use of informa-

tion relating to the prior representation whether or not the lawyer's representation of a private client is adverse to the government. See, e.g., United States v. Nasser, 476 F.2d 1111 (7th Cir. 1973); United States v. Ostrer, 597 F.2d 337 (2d Cir. 1979); Telos v. Hawaiian Tel. Co., 397 F.Supp. 1314 (D. Hawaii 1975). In such cases, the imputed disqualification of Rule 1.10 applies and screening may be employed only with the consent of the former government client. However, information may often fall within the exception stated in Rule 1.9(a) regarding information that becomes generally known. See Morgan, "Appropriate Limits on Participation by a Former Agency Official in Matters Before the Agency," 1980 Duke L.J. 1, 37-38.

*** *** ***

APPENDIX O

EXCERPTS

AMERICAN BAR ASSOCIATION

COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 342 November 24,1975

Following the 1974 amendment of DR 5-105(D), which extended every disqualification of an individual lawyer in a firm to all affiliated lawyers, the interpretation and application of DR 9-101(B) have been increasingly of concern to many government agencies as well as to many former government lawyers now in private practice. DR 9-101(B) is based upon former ABA Canon 36, but its standard or test is different. Our task is to interpret DR 9-101(B) in light of its history and in consideration of its underlying purposes and policies.

DR 9-101(B) reads as follows:

A lawyer shall not accept private

employment in a manner in which he had substantial responsibility while he was a public employee.

At the outset, the relationship between DR 9-101(B) and the provisions of Canons 4 (Confidences and Secrets) and 5 (Independent Professional Judgment) should be explored briefly. To some extent, the Disciplinary Rules of those two canons reinforce the same ethical concepts underlying DR 9-101(B).

The Disciplinary Rules of Canon 4 generally forbid a lawyer to reveal or use a confidence or secret of a client; see DR 4-101(B). That rule applies to a government lawyer as well as to private practitioners, for "the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities." A lawyer violates DR 4-101(B) only by knowingly revealing a confidence or

secret of a client or using a confidence or secret improperly as specified in the rule. Nevertheless, many authorities have held that as a procedural matter a lawyer is disqualified to represent a party in litigation if he formerly represented an adverse party in a matter substantially related to the pending litigation. Even though DR 4-101(B) is not breached by the mere act of accepting present employment against a former client involving a matter substantially related to the former employment, the procedural disqualification protects the former client in advance of and against a possible future violation of DR 4-101(B).

The Disciplinary Rules of Canon 5 bring into professional regulation, and with some specificity, the ancient maxim that one cannot serve two masters. The Disciplinary Rules of Canon 5 are con-

cerned largely with the effect of dual representation upon the quality of the professional service rendered to a client. Therefore the rules generally require a lawyer to refuse employment or to withdraw from employment when his exercise of professional judgment on behalf of a client may be affected; see DR 5-105; EC 5-14; and EC 5-15. The rules also forbid a lawyer to switch sides even in situations where the exercise of the lawyer's professional judgment on behalf of a present client will not be affected. To this extent, the Disciplinary Rules of Canon 5 regulate the employment a lawyer may undertake after concluding or terminating past employment, whether the past employment was as a private or as a public lawyer.

DR 9-101(B) appears under the maxim of Canon 9, "A Lawyer Should Avoid Even

the Appearance of Professional Impropriety." It is obvious, however, that the "appearance of professional impropriety" is not a standard, test or element embodied in DR 9-101(B). DR 9-101(B) is located under Canon 9 because the "appearance of professional impropriety" is a policy consideration supporting the existence of the Disciplinary Rules. The appearance of evil is only one of the underlying considerations, however, and is probably not the most important reason for the creation and existence of the rule itself.

The policy considerations underlying DR 9-101(B) have been thought to be the following: the treachery of switching sides; the safeguarding of confidential governmental information from future use against the government; the need to discourage government lawyers from

handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving government service; and the professional benefit derived from avoiding the appearance of evil.

There are, however, weighty policy considerations in support of the view that a special disciplinary rule relating only to former government lawyers should not broadly limit the lawyer's employment after he leaves government service. Some of the underlying considerations favoring a construction of the rule in a manner not to restrict unduly the lawyer's future employment are the following: the ability of government to recruit young professionals and competent lawyers should not be interfered with by imposition of harsh restraints upon future practice

nor should too great a sacrifice be demanded of the lawyers willing to enter government service; the rule serves no worthwhile public interest if it becomes a mere tool enabling a litigant to improve his prospects by depriving his opponent of competent counsel; and the rule should not be permitted to interfere needlessly with the right of litigants to obtain competent counsel of their own choosing, particularly in specialized areas requiring special, technical training and experience.

* * *

The extension by DR 5-105(D) of disqualification to all affiliated lawyers is to prevent circumvention by a lawyer of the Disciplinary Rules. Past government employment creates an unusual situation in which inflexible application of DR 5-105(D) would actually thwart the policy considerations

underlying DR 9-101(B). The question of the application of DR 5-105(D) to the situation in which a former government employee would be in violation of DR 9-101(B) should be considered in the light of those policy considerations, viz: opportunities for government recruitment and the availability of skilled and trained lawyers for litigants should not be unreasonably limited in order to prevent the appearance of switching sides, yet confidential information should be safeguarded, and government lawyers should be discouraged from handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving government service. The desire to avoid the appearance of evil, even though less important, must be considered. A realistic construction of DR 5-105(D)

should recognize and give effect to the divergent policy considerations when government employment is involved.

* * *

Likewise, DR 9-101(B)'s command of refusal of employment by an individual lawyer does not necessarily activate DR 5-1-5(D)'s extension of that disqualification. The purposes of limiting the mandate to matters in which the former public employee had a substantial responsibility are to inhibit government recruitment as little as possible and enhance the opportunity for all litigants to obtain competent counsel of their own choosing, particularly in specialized areas. An inflexible extension of disqualification throughout an entire firm would thwart those purposes. So long as the individual lawyer is held to be disqualified and is screened from any direct or indirect participation in the

matter, the problem of his switching sides is not present; by contrast, an inflexible extension of disqualification throughout the firm often would result in real hardship to a client if complete withdrawal of representation was mandated, because substantial work may have been completed regarding specific litigation prior to the time the government employee joined the partnership, or the client may have relied in the past on representation by the firm. (Emphasis supplied)

All of the policies underlying DR 9-101(B), including the principles of Canons 4 and 5, can be realized by a less stringent application of DR 5-105(D). The purposes, as embodied in DR 9-101(B), of discouraging government lawyers from handling particular assignments in such a way as to encourage their own future employment in regard to

those particular matters after leaving government service, and of avoiding the appearance of impropriety, can be accomplished by holding that DR 5-105(D) applies to the firm and partners and associates of a disqualified lawyer who has not been screened, to the satisfaction of the government agency concerned, from participation in the work and compensation of the firm on any matter over which as a public employee he had substantial responsibility. Applying DR 5-105(D) to this limited extent accomplishes the goal of destroying any incentive of the employee to handle his government work so as to affect his future employment. Only allegiance to form over substance would justify blanket application of DR 5-105(D) in a manner that thwarts and distorts the policy considerations behind DR 9-101(B). (Emphasis supplied)

Our conclusion is further supported by the fact that DR 5-105(C) allows the multiple representation that is generally forbidden by DR 5-105(A) and (B), where all clients consent after full disclosure of the possible effect of such representation. DR 5-105(A) and (B) deals, of course, with much more egregious contingencies than those covered by DR 9-101(B). It is unthinkable that the drafters of the Code of Professional Responsibility intended to permit the one afforded protection by DR 5-105(A) and (B) to waive that protection without also permitting the one protected by DR 9-101(B) to waive that less-needed protection. Accordingly, it is our opinion that whenever the government agency is satisfied that screening measures will effectively isolate the individual lawyer from participating in the par-

ticular matter and sharing in the fees attributable to it, and that there is no appearance of significant impropriety affecting the interests of the government, the government may waive the disqualification of the firm under DR 5-105(D). In the event of such waiver, and provided the firm also makes its own independent determination as to the absence of particular circumstances creating a significant appearance of impropriety, the result will be that the firm is not in violation of DR 5-105(D) by accepting or continuing the representation in question. (Emphasis supplied)

Although this opinion has dealt explicitly and at length with the interpretation and application of DR 9-101(B), it is not amiss to point out that, on the ethical rather than the disciplinary level of professional responsibility, each lawyer should

advise a potential client of any circumstances that might cause a question to be raised concerning the propriety of his undertaking the employment and should also resolve all doubts against the acceptance of questionable employment. See EC 5-15 and EC 5-16.

SUPREME COURT, U.S.
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Docket No. 82-446

In The

Supreme Court of the United States

October Term, 1982

GREITZER & LOCKS, GENE LOCKS and MARTIN GREITZER; NEIL R. PETERSON,

Petitioners,

v.

RAYMARK INDUSTRIES, INC.;
PITTSBURG CORNING CORPORATION;
H. K. PORTER COMPANY;
SOUTHERN TEXTILE CORPORATION;

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In The

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GREITZER & LOCKS, GENE LOCKS and MARTIN GREITZER; NEIL R. PETERSON,

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RAYMARK INDUSTRIES, INC.; PITTSBURG CORNING CORPORATION; H. K. PORTER COMPANY; SOUTHERN TEXTILE CORPORATION;

*Respondents.**

STATEMENT OF THE CASE

District Court Proceedings

This appeal emanates from the asbestos litigation pending in the Norfolk and Newport News Divisions of the United States District Court for the Eastern District of Virginia. On November 26, 1980, several of the defendant-manufacturers moved to disqualify Neil R. Peterson and the Philadelphia law firm of Greitzer & Locks from further representation of plaintiffs in the Virginia litigation. (Record 43.)**

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*The following respondents named in petitioners' petition for Writ of Certiorari have declined to join this Brief in Opposition: Johns-Manville Corporation and Johns-Manville Sales Corporation (pending bankruptcy stay pursuant to 11 U.S.C. § 362); Eagle-Picher Industries, Inc.; UNARCO Industries, Inc.; The Celotex Corporation; Keene Corporation. The names of the above-mentioned corporations, subsidiaries and sub-subsidiaries have been filed with the Fourth Circuit Court of Appeals in the case below and are to be adopted pursuant to Rule 28.1 of the United States Supreme Court Rules.

**Record (R) refers to Appendix filed in the United States Court of Appeals for the Fourth Circuit.

Oral argument on the disqualification motion was held January 27, 1981 (R. 124), and an evidentiary hearing was held on February 27, 1981. (R. 252.) By Order and Opinion dated April 6, 1981 (R. 540), and by Amended Order and Opinion dated May 6, 1981 (R. 574), the three active status judges of the District Court unanimously ordered that Peterson and the firm of Greitzer & Locks be disqualified from further participation in the Virginia asbestos litigation. Only the disqualified lawyers filed a notice of appeal from those decisions. (R. 572, 600.)

Fourth Circuit Court of Appeals Proceedings

On appeal to a Three Judge Panel of the United States Court of Appeals for the Fourth Circuit, the majority in a split decision, reversed the District Court's disqualification of Greitzer & Locks as to actions against the manufacturers by Opinion dated March 5, 1982. Some of the manufacturers sought a Petition for Rehearing En Banc, which was granted April 23, 1982. Oral argument was heard by the Fourth Circuit Court of Appeals, sitting *en banc*, June 6, 1982. The full Court affirmed the District Court's Order of Disqualification by an equally divided court by Order of June 17, 1982.

This brief is filed in response to the disqualified lawyer's Petition for a Writ of Certiorari.

Facts

After many years of trial work for the Department of Justice, Peterson was promoted to supergrade status as Special Litigation Counsel on September 21, 1977. He retained that position until his resignation on October 3, 1980. As Special Litigation Counsel, Peterson also had direct responsibility for the defense of the United States in the Virginia asbestos litigation with respect both to direct ac-

tions brought against the United States by plaintiffs and third-party actions brought by defendants against the United States. (R. 576, 601.) He personally conducted most, and directed and supervised all, of (1) the Virginia asbestos litigation as to pretrial investigation and discovery, (2) legal and scientific research, (3) development of legal theories and strategies, (4) examination of documents, (5) preparation of factual and expert witnesses, (6) preparation of pleadings and briefs, (7) oral argument of motions and appeals, (8) deposing of adverse witnesses, (9) deposing of former and present government employees, (10) preparation of cases for trial, and (11) actual trial. (R. 50-53, 102-108, 576-577, 601, 616-617.)

Moreover, Peterson was the national coordinator of asbestos litigation for the Government from September 21, 1977, through October 1, 1979. As such, he was involved in reviewing "all correspondence dealing with substantive matters, strategy and tactical planning, all answers to interrogatories, and all pleadings and motions" for the Government on a national basis. (R. 601.) As coordinator "Mr. Peterson also required his prior approval of all requests to client agencies for litigation assistance and contacts with prospective witnesses, acted as spokesperson to the press and public, and acted as liaison officer and counselor to clients agencies." (R. 601.)

In addition to these functions, Peterson also represented the Government in asbestos concerns related to: (1) legislative matters, including commentary on proposed legislation, lobbying with Congress, attending Congressional hearings, and preparing government personnel and documentation for presentations to congressional committees; (2) personal representation of two federal Maritime Commission employees during their discovery depositions; (3) responding to

Freedom of Information Act (FOIA) requests directed to the Department of Justice and advising the United States Navy on its responses to FOIA requests; (4) advising the Navy "concerning the preservation, collection and indexing of asbestos-related documents;" and (5) coordination of the Government's discovery efforts at Navy shipyards in California and South Carolina (R.104-105.)

During Peterson's tenure as Special Litigation Counsel, he had personal involvement in asbestos litigation in Louisiana, Texas, Pennsylvania, and Massachusetts as well as Virginia. (R. 102-103.) Similarly, his coordinator duties involved him in asbestos litigation in Connecticut, Illinois, Massachusetts, Pennsylvania, California, South Carolina and New Jersey. (R. 103-105, 601-603.)

By early as January of 1980, Peterson began to seek new employment. (R. 316.) Upon learning that Peterson planned to leave the government, Gene Locks sought him out and hired him as a salaried associate. (R. 358, 372.) Peterson began work for Greitzer & Locks October 6, 1981. Greitzer & Locks specifically hired Peterson because of his experience and knowledge of asbestos-related litigation. (R. 578, 358, 367, 69). Peterson was immediately assigned to work on various asbestos cases pending in Pennsylvania and a motion was filed for him to appear in the New Jersey litigation.[1] (R. 72-73, 366-368, 95, 106.)

Greitzer & Locks is a six person law firm located in Philadelphia, Pennsylvania. (R. 350, 678.) As of April 23, 1981, the firm served as co-counsel of record representing 260 of the 333 individual plaintiffs in the Virginia asbestos litigation.

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[1] According to Peterson's counsel, after the Government expressed concern over Peterson's participation in New Jersey, the motion for him to appear was withdrawn. (R. 95.)

Nationwide, as of the date Peterson was hired, Greitzer & Locks was associated in the representation of more than 1,500 plaintiffs in asbestos-related litigation. (R. 68.) Approximately 40% of these cases involved shipyard workers and many of the remainder involved plant workers. (R. 69.)

In September, 1980, Peterson notified the Government of his intention to join Greitzer & Locks, of his intention to participate in asbestos litigation outside Virginia, and of his intention to interpose an intra-firm "screen," purportedly shielding him from involvement in the Virginia litigation. In view of the screening mechanism, Peterson asked the government to waive vicarious disqualification of Greitzer & Locks from participation in the Virginia asbestos litigation. (R. 101-109.) Peterson began his employment with Greitzer & Locks without a waiver, or assurance of a waiver.

Subsequent to Peterson's initial request for waiver, the Department of Justice circulated a letter to its various client agencies for comments or objections to Peterson's proposal. (R. 601-602, 738-740.) A follow-up letter attached copies of two memoranda submitted by Peterson to the Department of Justice. (R. 740, 100-112.) In response to these inquiries several client agencies expressed grave concern over Peterson's proposal and disagreed vehemently with the premises and assumptions upon which Peterson based his request for waiver.

Faced with these unfavorable comments, Peterson's counsel, during the week of December 29, 1981, met with representatives from the Civil Division and Office of Legal Counsel of the Department of Justice[2] to persuade them to issue some type of waiver, and to issue it quickly, before the hearing on the Motion to Disqualify Peterson, Greitzer

[2] The defendant-manufacturers who had filed the Motion to Disqualify were not given notice of this meeting and did not attend.

& Locks then set for January 27, 1981. (R. 344-45.) In order to get some type of waiver issued, Peterson agreed to a broader and more stringent screening than supposedly was in effect since his joining Greitzer & Locks on October 6, 1981. The new screening is found in Peterson's lawyer's six-page, single-spaced letter to the Civil Division dated January 7, 1981. (R. 92-98.) Unlike Peterson's first proposal, the January proposal was not circulated in writing to the client agencies for comment. Rather, the six-page document was read to the client agencies by telephone on January 7 or January 8, in order that some type of conditional waiver could be issued in time for the January 27 hearing. (R. 344-345.)

The Motion to Disqualify was then orally argued with Judge Clarke presiding, who informed the parties that although he was hearing the argument, all three active status judges would rule on the matter. This procedure was decided upon the day before the hearing since all the judges were going to adjudicate asbestos trials, and all of the judges believed that it would be improper for only one judge to decide the issue. (R. 130-131.)

During the course of the hearing, counsel for Mr. Peterson contested the accuracy of the affidavits filed on behalf of the defendant-manufacturers. In view of the fact that the Motion to Disqualify was not the type of motion which can proceed upon disputed affidavits (*e.g.* FED. R. CIV. P. 56), the Court asked counsel for Peterson if they wanted an evidentiary hearing and received an affirmative response. (R. 183.) Judge Clarke granted that request and ordered an evidentiary hearing because the Court did not want to make a ruling of law when the facts were in dispute. (R. 214-219.) The Court notified the parties that all three judges would preside over the evidentiary hearing. (R. 214.)

During the argument, the Court expressed concern that Peterson's participation in cases emanating from the Philadelphia Naval Shipyard might erode the effectiveness of the Virginia screen. In response, the disqualified lawyers offered to screen Peterson from those cases for a period of two years if the Court would not disqualify Greitzer & Locks. (R. 214, 237-239, 268-269.) This type of screen had not been a part of Peterson's initial screening proposals.

At the evidentiary hearing held February 27, 1981, the defendants introduced evidence concerning confidential information about the manufacturers and the government which Peterson knew, or was presumed to know, because of his access to that information and/or his subordinates' direct knowledge of it. The defendants' exhibits establish the following:

(1) Proprietary information about the manufacturers was disclosed to the Navy Bureau of Medicine & Surgery with the understanding that it remain confidential. Peterson had access to this information and his subordinates had direct knowledge of it. (R. 778);

(2) Peterson's subordinates were privy to the manufacturers' interviews of government witnesses which were to remain confidential, and Peterson discussed the interviews with his subordinates. (R. 776-777, 323-325);

(3) Peterson was given a copy of the amounts each defendant contributed to the *Glover* settlement with the plaintiffs. (R. 779, 326);

(4) Peterson and his subordinates reviewed and withheld numerous government documents and infor-

[a] This case, *Glover* v. *Johns-Manville Corp., et al.*, C.A. No. 78-648-N (E.D. Va. 1978) was settled in 1978. Mr. Glover was employed by the Norfolk Navy Shipyard in the Pipe Coverers Department. His complaint alleged he contracted asbestosis due to his exposure to asbestos-containing products.

mation during discovery on grounds of privilege, litigation strategy, work product, national security, relevancy and materiality. (R. 309-310.)

Peterson either knew or had access to the above-referenced information during his tenure as Special Litigation Counsel and asbestos coordinator. This information had not been previously available to the plaintiffs.

In light of the evidence presented at the evidentiary hearing, the three active status judges of the District Court unanimously disqualified both Peterson and Greitzer & Locks from further participation in the Virginia litigation. This action was taken on the grounds that the proposed screening could not adequately protect against potential disclosures of information from Peterson to Greitzer & Locks which would be prejudicial to the United States. The Court found that a threat to the integrity of the Virginia litigation and an impermissible appearance of a significant professional impropriety existed, without having to address the evidence pointing to a prejudicial impact upon the manufacturers.

ARGUMENT

I. The Petition For Writ Of Certiorari Should Be Denied Because This Court Lacks Subject Matter Jurisdiction And Petitioners Lack Standing.

On August 26, 1982, Johns-Manville Corporation filed Chapter 11, Reorganization proceedings in the Bankruptcy Court in the Southern District of New York.

Johns-Manville's filing under Chapter 11 of the Bankruptcy Act removes subject matter jurisdiction from this Court over all aspects of this case. Title 11 U.S.C. § 362 (a)(1) stays automatically all proceedings against "all entities" affected, i.e. Johns-Manville and all of the other defendants remaining in this cases.

11 U.S.C., § 362(a) provides:

> "A petition . . . operates as a stay to all entities, of
>
> (1) . . . proceeding against the debtor or other proceeding against the debtor that was commence[d] . . . or to recover a claim against the debtor that arose before the commencement of the case under this title. . . ."

The stay of the Bankruptcy Court continues in effect until terminated by other provisions of Section 362, none of which have yet occurred. While there are exceptions to the application of the automatic "stay upon filing" in section 362(b) of the Bankruptcy Act, none of the stated exceptions are applicable to vitiate the Johns-Manville stay. The one remaining exception to the stay is a request for relief from the stay. 11 U S.C. 362(d).

The language of Section 362, controlling herein, is the provision that the stay is "applicable to all entities." Co-defendants and the debtor benefit equally by this language. This has been explicitly recognized in *In Re White Motor Credit Corp.*, 11 Bankr. Rep. 294 (N.D. Ohio 1981), where the Court recognized the stay in some 160 products liability actions pending across the United States. The pertinent language underscores the staying of *all* actions against *all* defendants:

> All of the products liability suits have been effectively stayed by the operation of § 362 of the Code, 11 U.S.C. § 362(a). This section operates as a stay, applicable to all entities, of the commencement or continuation of a judicial proceeding against the debtor that was or could have been commenced before filing of the reorganization. 11 U.S.C. § 362(a)(1). Section 362 operates to stay as well the "employment of process," e.g. discovery requests, preservation of testimony, seeking entry of judgment after a successful appeal, or service

> of process and joinder of parties thereby. Importantly, *the stay operates as a windfall benefit to co-defendants* and insurance companies *who, along with debtor, enjoy many of the benefits of the moratorium.* Nevertheless, for many reasons (perhaps including § 362 itself), products liability plaintiffs cannot dismiss a reorganization debtor and proceed against co-defendants only. Actions taken in violation of the stay are without effect." *Id* at 295. (Citations omitted.) (Emphasis added.)

In *Federal First Life Ins. Co. (Mutual)* v. *First Financial Group of Texas, Inc., et al.*, 3 Bankr. Rep. 375 (S.D. Tex 1980) the district court refused to sever a claim against one of three joint tortfeasors. The court held that because the allegation against the three defendants were ". . . inextricably interwoven, presenting common questions of law and facts, which can be resolved in one proceeding" the stay of the action against one party requires the stay against the others. 3 Bankr. Rep. 375, at 376. The defendants and the issues of law in these present cases are so interwoven that it would be prejudicial to the defendants to proceed with this case without Johns-Manville.

The prejudicial effects of continuing against some co-defendants but not the debtor are recognized in *White Motors* and are used as reasons supporting the stay as to all defendants. Reasons advanced include substantial uncertainty and chaos to the rights of all parties concerned, the possibility of multiple court actions, and the risk of loss or serious challenge to various insurance coverages.

The disqualified lawyers should be denied their petition because they are not parties to this suit. The Supreme Court of Illinois has determined that a disqualified lawyer does not have sufficient justiciable interest in the merits of a case to confer standing to appeal. *Almon* v. *America Carloading*

Corporation, 380 Ill. 524, 44 N.E.2d 592, 595-96 (1942). The Illinois Court specifically held that a legal fee is not a sufficient interest to create standing to appeal.

II. This Court's Scope Of Review Is Limited To Determining Whether The District Court Abused Its Discretion In Disqualifying Greitzer & Locks.

It is evident from the record below and the various briefs filed in this matter that the facts are hotly contested. In petitioner's brief, the disqualified lawyers repeatedly take issue with the facts as found by the District Court. Similarly, the disqualified lawyers dispute the validity of the manufacturers' evidence establishing that Peterson knows and/or had access to confidential information about these defendants and the government which would be prejudicial to the manufacturers if transmitted to Greitzer & Locks.

In view of this factual dispute, and the prevailing law in most Federal Circuits, this Court's scope of review is limited to finding an abuse of discretion. *See, e.g., Aetna Casualty & Surety Co.* v. *United States*, 570 F.2d 1197, 1200 (4th Cir.), *cert. denied*, 439 U.S. 821 (1978); *Cheng* v. *GAF Corp.*, 631 F.2d 1052, 1055 (2d Cir. 1980); *vacated on other grounds*, 450 U.S. 903, (1981); *Gas-A-Tron* v. *Union Oil Co.*, 534 F.2d 1322, 1325 (9th Cir.) (per curiam), *cert. denied*, 429 U.S. 861 (1976). This standard of review is based on the recognition that disqualification orders are issued pursuant to the authority of the District Court to supervise the ethical conduct of attorneys who practice before it. Indeed, "[t]he primary responsibility for controlling the conduct of lawyers practicing before the district court rests with that court." *Trone* v. *Smith*, 621 F.2d 994, 999 (9th Cir. 1980). The District Court, because of its fact finding capabilities, is in the best position to determine if any

appearance of impropriety exists. Consequently, in cases involving factual disputes, appellate courts will not reverse a disqualification order unless an abuse of judicial discretion can be identified.

In the instant case, there was no abuse of judicial discretion. As is demonstrated by the following, the District Court's findings of fact are amply supported by the evidence and the disqualification order was based upon sound legal precedent and ethical considerations.

III. The District Court Was Correct In Its Disqualification Of Peterson In The Virginia Asbestos Litigation.

It is conceded by petitioners in their brief that Peterson is and should be disqualified from participation in the Virginia asbestos litigation based upon the findings of fact by the District Court. (Petitioners' Brief 16.) This assessment of the District Court was based upon the following factors:

(1) The defendant manufactures would be highly prejudiced in the Virginia asbestos litigation because:

(a) Peterson had access to Government files and information sought by defendant's Requests for Production and Interrogatories. Defendants were denied access to these materials because of the Government's objections based upon attorney-client privilege and work product.

(b) Peterson had knowledge of defendant's trial tactics, strategies and the assessment of their legal position.

(c) He was included in the manufacturers settlement negotiations in the *Glover* case and was privy to the settlement breakdown to each manufacturer.

(d) He possessed the confidences of the United States.

(e) In his position with the government, the knowledge of his subordinates was imputed to him. *United States* v. *Standard Oil*, 136 F. Supp. 345, 354, 362 (S.D.N.Y. 1955).

(2) Peterson switched sides in the midst of the pending litigation.

(3) The Virginia litigation is complex, protracted and involves hundreds of plaintiffs and millions of dollars.

(4) Peterson negotiated with Greitzer & Locks while still employed by the Government without seeking prior approval from the court or other parties in the case.

(5) Only two days separated Peterson's status as lead counsel for the Government and his employment with Greitzer and Locks.

(6) Peterson was hired as a salaried employee to work specifically on asbestos cases similar to the Virginia cases.

All parties concede Peterson's participation in the Virginia litigation would subject him to the sanctions of the Ethics in Government Act, 18 U.S.C. § 207. He is also ethically prohibited from such participation by Canon 9 and the mandatory prohibition of DR 9-101(B).[4] This rule states:

> A lawyer shall not accept employment in a matter in which he had substantial responsibility while he was a public employee.

[4] Canon 9 states that "[A] lawyer should avoid even the appearance of professional impropriety." Ethical Consideration (EC) 9-3 notes that the reason for the mandatory prohibition of DR 9-101 (B) is that the proscribed conduct "would give the appearance of an impropriety even if none exists."

In this factual situation, for Peterson to accept such employment would clearly give the public the appearance of professional impropriety. The District Court found as a matter of fact that Peterson's involvement with the Government ethically prohibited him from switching sides and representing the plaintiffs in the same litigation. This holding is unquestionably supported by every legal and ethical precedent cited by either party. *See e.g., Trone* v. *Smith, General Motors Corp.* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974); *Hull* v. *Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975).

IV. Given The Factual Situation, Neither The Waiver Of Imputed Disqualification Nor The Purported Screen Are Sufficient To Prevent The Appearance Of Impropriety From Inuring To Greitzer & Locks.

Because Peterson must be disqualified under the tenets of Canon 9 and DR9-101(B), Disciplinary Rule 5-105(D) requires generally that any law firm affiliated with a disqualified attorney be likewise disqualified from continued participation in the same litigation.[8] It would appear under these ethical requirements of the America Bar Association, that any government attorney would be unable to enter private practice for fear of disqualifying his new firm. To remove this paradox, the American Bar Association Committee on Ethics and Professional Responsibility issued Formal Opinion 342 (November 24, 1975) (hereinafter Formal Opinion 342) (App. O at A-168), in which it outlined

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[8] DR 5-105 (D) states:

> If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, no associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

the requirements of an exception whereby government lawyers could avoid imputed disqualification of the private firm.

The first of these requirements is a *waiver* of imputed disqualification. Such waiver amounts to the Government's consent to the leaving lawyer to step into the world of private practice. However, as a prerequisite for such waiver, the Government must be assured a second requirement is met, that of a suitable "screen." Such a suitable screen is one which prevents the passage of any knowledge to the other members of the firm that may be prejudicial to any adverse party. If such a screen is effectuated, and a waiver of vicarious disqualification is issued, Formal Opinion 342 grants the one exception to imputed disqualification. Without considering the requirements for an exception to vicarious disqualification, the petitioners argue against the imputed disqualification of Greitzer & Locks in the Virginia asbestos cases. To do so ignores the knowledge of Peterson, and now Greitzer & Locks, the size of the firm of Greitzer & Locks, and the nature of the litigation. The preventative measures purportedly taken by the disqualified lawyers do not destroy the significant appearance of professional impropriety since they came at best after the fact, and the potential for taint had already begun.

The exception to the imputed disqualification rule is not automatic even if waiver and screens are in existence. Each case of imputed disqualification is *sui generis* and must be regarded on a case by case basis. *Armstrong* v. *McAlpin*, 625 F.2d 433 (2d Cir. 1980) (en banc), *vacated on other grounds*, 449 U.S. 1106 (1981). At the time Peterson joined the disqualified lawyers' firm, there had been no waiver of imputed disqualification issued by the Government. Thus it is clear that Greitzer & Locks must be dis-

qualified from the Virginia litigation, Formal Opinion 342 notwithstanding.

A. The Screen Is Insufficient To Stop Peterson's Knowledge Of The Virginia Litigation From Tainting Greitzer & Locks.

In September, 1980, Peterson notified the Government of his intention to join Greitzer & Locks, of his intention to participate in asbestos litigation outside Virginia, and of his intention to establish an intra-firm "screen" which purportedly would shield him from involvement in the Virginia litigation. Peterson also asked the Government to waive imputed disqualification of Greitzer & Locks from participation in the Virginia asbestos litigation. (R. 101-112.)

Following Peterson's request for waiver, the Department of Justice circulated a letter to the various client agencies Peterson had represented for comments or objections to Peterson's proposal (R. 601-603, 738-740.) A follow-up letter attached copies of two memoranda submitted by Peterson to the Department of Justice. (R. 740, 100-112.)

In response to these inquiries, several client agencies expressed grave concern over Peterson's proposal and disagreed with the reasons upon which Peterson based his request for waiver. By letter of December 3, 1980, the General Services Administration (GSA) stated:

> I am writing in response to your letter of October 30, 1980, which requests GSA's position on the above-referenced matters. In the September 10, 1980 letter, Mr. Peterson states, "I would assume that having participated in a case . . . which participation was limited to securing a dismissal for failure to file an administrative claim and involved no activity on the merits of the litigation, would not bar me from later participation in the private sector in merits litigation." We disagree.

Mr. Peterson is attempting to apply a narrow focus to the situation. However, he was coordinator of all asbestos litigation, and therefore, we cannot adopt his narrow view.

Mr. Peterson was Special Litigation Counsel for 3 years, approximately 2 of which he spent as coordinator of all asbestos litigation. In fact, Mr. Peterson states that he was "strategy coordinator of asbestos litigation against United States." As such, his position would refute his statement that he has ". . . no 'inside' knowledge concerning any agency of the United States in relation to asbestos issues, either documentary or mental. . . ."

As "strategy coordinator," he would be privity to inside, special information, as well as trial strategy used in the asbestos cases. Since most asbestos cases concern similar legal and factual issues, Mr. Peterson is knowledgeable on the strategy position that the Government presently takes and will probably take on all cases (whether or not Mr. Peterson personally handled them).

We are also sending you a list of documents which would refute Mr. Peterson's statement that he has no inside knowledge. We have included correspondence addressed to others with copies to Mr. Peterson; correspondence sent to attorneys at the Department of Justice between September 21, 1977, and October 1, 1979; and papers written by Mr. Peterson.

* * *

Finally, we cannot agree with Mr. Peterson's statement, "In all such cases [where the U.S. is a third-party defendant], the interest of the plaintiffs and the United States coalesce, since plaintiffs do not want manufacturers to evade responsibility by blaming the United States and thus escaping liability to them." The United States' interest, as a third-party defendant, would not coalesce with that of plaintiffs. (R. 605-608.)

Similarly, the Department of Health and Human Services expressed concern over the proposal screening.

> Based on our lengthy association with Mr. Peterson in preparation for the defense of asbestos cases in which this Department is or may be a defendant we have the following concerns about Mr. Peterson's current activities:
>
> > Mr. Peterson has had free and complete access to records of this Department regarding the effects of asbestos.
> >
> > He has had immediate and constant contact with employees of this Department who are experts in this area of science.
> >
> > In personal meetings and interviews with scientific employees of this Department, who will in all likelihood be witnesses in these cases, he had in many cases established a close working relationship and unique rapport. Thus, he had been able to assess the strengths and weaknesses of our position and to even formulate the manner in which the factual and scientific portion of the cases will be presented.
>
> Consequently, we have serious reservations about the propriety of Mr. Peterson's continued activities in these cases because our collaboration with Mr. Peterson seems to warrant a conclusion that an attorney-client relationship existed between Mr. Peterson and possible witnesses in these cases who are employed by this Department. (R. 609-610.)

By letter of December 4, 1980, the Department of Labor responded, stating:

> [W]e know of no confidential information supplied to Mr. Peterson in connection with asbestos litigation.

> However, we cannot be positive that no such information was supplied. In any event, our concern would not be so much with specific information on specific cases as it would be with Mr. Peterson's knowledge, gained as a result of his employment with the Department of Justice, of the Government's tactics and strategy in asbestos litigation. We feel that Mr. Peterson must be as familiar with the Government's tactics and strategy, and its strengths and weaknesses, and what it can and cannot prove as anyone. It is our opinion that all of this must be considered in considering Mr. Peterson's request. (R. 611.)

All three agencies felt Peterson's proposed screen was not sufficient in light of his extensive knowledge of the Government's tactics and strategies. (R. 609-610, 611.)

A fourth client agency, the Department of the Navy, by letter dated December 3, 1980 stated that while it had no objection to the proposed screening, it was concerned over Peterson's participation in (1) asbestos cases in which Government attorneys whom he supervised were involved and (2) any cases involving present or former employees of naval shipyards. (R. 122.) Unfortunately, Peterson had by then already made the switch without the waiver.

The Office of Legal Counsel for the Department of Justice (OLC) was also asked to comment on the matter, and it too voiced concerns. In its response to the Civil Division, OLC noted that, when Peterson acted in a supervisory capacity, he may have had substantial personal participation. This observation was based on the examples supplied by the Civil Division, which seemed "to indicate that when Peterson supervised a case, he participated in it personally and substantially because his style of supervision was fairly detailed and rigorous." (R. 116.) Furthermore, OLC commented that in view of the scope of Peterson's involvement

in asbestos litigation, it seemed "likely that he has obtained numerous client confidences" from the various government agencies. (R. 120.)

Faced with these unfavorable comments, Peterson's counsel, during the week of December 29, 1981, met with representatives from the Civil Division and OLC, to persuade them to issue some type of waiver, and to issue it quickly, before a hearing on the Motion to Disqualify then set for January 27, 1981. (R. 344-45.) The Government finally agreed, but not before Peterson had to agree to new, broader, and more stringent screening than was supposedly in effect since joining Greitzer & Locks on October 6, 1981.* The new screening was memorialized in Peterson's lawyer's six-page, single-spaced letter to the Civil Division dated January 7, 1981. (R. 92-98.) Based upon Peterson's promise to initiate these additional safeguards, the Department of Justice finally waived the imputed disqualification of Greitzer & Locks in the Virginia litigation.

This waiver came ninety days after the fact and amounted at best to the proverbial locking of the barn after the escape of the horse. Disciplinary Rule 5-105(D) recognizes "the close, informal relationship among law partners and associates and . . . the incentives, financial and otherwise, for partners to exchange information freely among themselves when the information relates to existing employment." Formal Opinion 342, n.2, 62 A.B.A. J. 517 (1976).

The inability to adequately screen is further magnified in considering that Greitzer & Locks is a small, specialized firm, comprised of two partners and four associates with the bulk of their work in asbestos litigation.

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* The additional requirements for the intra-firm screen required by the Department of Justice before it issued the waiver are set out in the District Court's opinion. (App. C at A 65-66.)

In view of this, it appears unlikely that even inadvertent disclosures can be avoided between Peterson and the disqualified attorneys regardless of the type screening mechanism used. Disqualification of the entire firm is the only effective remedy to guard against the possibility of inadvertent use of confidential information. *See Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975) *overruled on other grounds* in *Armstrong* v. *McAlpin*. Even decisions strongly supportive of screening acknowledge that screening will not be adequate in all instances. *See, e.g., Sierra Vista Hospital, Inc.* v. *United States*, 639 F.2d at 749, 754 (Ct. Cl. 1981); *Armstrong* v. *McAlpin*, 625 F.2d at 446; *Kesselhaut* v. *United States*, 555 F.2d 791, 793 (1977).

In furtherance of disqualification as the only effective remedy under the facts of this case, *Armstrong* v. *McAlpin*, 461 F. Supp. 622 (S.D.N.Y. 1978), *aff'd* 625 F.2d 433 (2d Cir. 1980) (en banc) is instructive. First, the Court declared the former government attorney disqualified by DR 9-101(B). The Court next discussed vicarious disqualification and the interplay of DR 5-105(D) and Formal Opinion 342, stating that screening is available under Formal Opinion 342 *only* when an appearance of a significant impropriety is absent. *Id.* at 624. The Court also noted with approval the New York City Bar Association's Ethic Committee statement that:

> [S]ituations may arise where the firm must be disqualified due to inadequate screening of the individual attorney . . . or an appearance of impropriety that simply cannot be removed by any degree of screening when the disqualified attorney's relationship with the matter in government was extremely close and significant. *Id.*, 625.

McAlpin is particularly relevant here because (1) there has been a significant appearance of impropriety created by Mr. Peterson's switching sides *vis a vis* the degree of his involvement with asbestos litigation as a government attorney, (2) there has been inadequate screening adopted because of Peterson's involvement in asbestos litigation against these same defendants outside Virginia and (3) there was no waiver granted for at least ninety days.

The District Court found both as a matter of law and of fact the screening measures initiated by the disqualified attorneys were insufficient, given the circumstances, to prevent prejudice to the defendants or to prevent taint to the Virginia litigation. The Court disdained the cavalier and callous manner in which waiver and screening evolved, noting its emanation as an after the fact, perchance consideration by the disqualified lawyers. (App. A 51-96.) The District Court *did not* reject *all* government screens as a method of preventing imputed disqualification as petitioners suggest. (Pet. Brief. 21.) The Court's decision was based upon the unanimous decision by its three judges, who cumulatively now have over fifteen (15) years experience in the Virginia asbestos litigation.

B. The Government's Waiver Of Vicarious Disqualification Is Not Binding Upon The District Court.

The District Court had the obligation to inquire into the adequacy of the proposed screen in order to understand the basis of the waiver. This duty is non-delegable and any waiver of imputed disqualification is not binding on the Court. *See, e.g., Kesselhaut* v. *United States*, 555 F.2d 791, 794 (Ct. Cl. 1977); *In re Gopman*, 531 F.2d 262, 266 (5th Cir. 1976); *Trone* v. *Smith*, 621 F.2d 994, 999; *Cheng* v. *GAF*. As the District Court recognized,

> [It] is the non-delegable responsibility of this Court to see that lawyers practicing before this Court maintain the highest standards of professional conduct in the management of cases before it, and to insure that nothing, not even the appearance of impropriety, is permitted to tarnish the judicial process or shake the confidence of the public in the legal profession. (R. 583.)

Both the government (Brief of U.S. at 18 n. 6)* and the disqualified lawyers (R. 184) concede the waiver of imputed disqualification is subject to judicial review.

Formal Opinion 342 contemplates that a waiver be given by all affected parties before imputed disqualification can be avoided.[1] The record demonstrates that the interests of the manufacturers were severely impacted by Peterson's association with Greitzer & Locks. No consent or waiver was ever sought or obtained from the defendant-manufacturers.

The *raison d'etre* of Formal Opinion 342 is to allow government attorneys to enter private practice without violating the Canons of Ethics. The Government is concerned that without this guarantee, its opportunities for recruiting capable young lawyers is severely restricted. Formal Opinion 342 suggests a procedure that will allow a young attorney who wishes to enter private practice after a few years employment with the government to do so. The Opinion suggests a similar procedure for a government attorney with 17 years experience but recognizes that such switches are in part limited. The Canon's chill to freedom of movement can only be removed *if* the safeguards of the Canons are

*Amicus Curiae Brief filed by the United States in the Court of Appeals for the Fourth Circuit.

[1] *E.g., Armstrong* v. *McAplin, Kesselhaut* v. *United States,* 555 F.2d 791, 794 (Ct. Cl. 1977). *See also,* Commission on Professional and Judicial Ethics, Bar Association of the City of New York, Op. No. 889, 31 THE RECORD 552, 571 (1976).

followed. The Canons' prerequisites exist to preserve the integrity of the judicial system, and on balance such integrity must always outweigh the Government's interests in placing their former attorneys in private practice as suggested by Formal Opinion 342. That integrity balance must never be subservient to the caprice, avarice and indifference of the individual seeking the Canon's exception.

Many Courts have held that an appearance of significant professional impropriety can be the sole basis for disqualification.[8] *See In re Coordinated Pre-trial Proceedings, etc.*, 658 F.2d 1355 (9th Cir. 1981). The Ninth Circuit held:

> After carefully reviewing the policy considerations on both sides, we hold that Canon 9 alone can be the basis for a disqualification motion. In order that the court may in fact control the conduct of attorneys appearing before it, the court should have the ability to disqualify attorneys if their conduct actually interferes with the integrity of the court, or actually produces an appearance of impropriety. However, an order of disqualification by a district court that is not based on articulable principles cannot be sustained. This court will affirm such an order only where the impropriety is clear and is one that would be recognized as such by all reasonable persons . . . The impropriety must affect the public's view of the judicial system or the integrity of the court. Id. at 1360-61. (citations omitted)

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[8] Formal Opinion 342 was directed at the typical administrative practice of Washington lawyers. The concern was with an agency lawyer joining a firm which practices before that agency. However, because this litigation involves multiple parties, including the United States, to give full effect to the spirit and intent of Formal Opinion 342, *all* affected parties must consent to the waiver before the mandatory prohibition of DR 5-105 (D) can be avoided.

Despite the proposed screen and waiver, the District Court determined Peterson's association with Greitzer & Locks constituted a threat to the integrity of the Virginia litigation, constituted an unacceptable appearance of professional impropriety, and "would seriously compromise the public's perception of the integrity of this Court and shake the public's confidence in the administration of justice." (R. 591-596.) In view of these findings, Canon 9 alone warrants affirmance of the District Court's order of disqualification by refusal of the Writ of Certiorari.

V. Potential Prejudice To The Defendant-Manufacturers Is A Sufficient Basis Upon Which To Disqualify Greitzer & Locks.

The petitioners argue the District Court's findings requiring the vicarious disqualification of Greitzer & Locks were based upon pure speculation. The factual situation and the corresponding law do not support this contention. *Actual proof* of *prejudice* is not required to sustain a court's findings for imputing disqualification of a tainted attorney to his entire law firm. *Armstrong; Board of Education* v. *Nyquist*, 550 F.2d 1241, 1246, 1248 (2d Cir. 1970). *See also, Trone* v. *Smith*. All that is required for the District Court to find vicarious disqualification of Greitzer & Locks is (1) Peterson possessed information which would prejudice the manufacturers and taint the Virginia litigation if transmitted in any fashion to his new firm and (2) that there existed a *potential* for the transmission of that knowledge whether knowingly or inadvertently. *E.g. Cheng* v. *G.A.F. Corp.*, 631 F.2d 1052, 1057-1059. *See also, Westinghouse Electric Corp.* v. *Kerr-McGee Corp.*, 580 F.2d 1311, 1321 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978); *Scholetter* v. *Railoc of Indiana, Inc.*, 546 F.2d 706, 711 (7th Cir. 1978). Based upon the evidentiary hearing of February 27,

1982, the three judge panel of the District Court unanimously made both specific findings. Petitioner's contentions that the District Court's determinations were based solely upon speculation are without substance.

The disqualified lawyers rely upon *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981) to demonstrate that the possibility of taint in the trial proceedings is an insufficient basis for disqualification. *Id.* at 376. This reliance is misplaced. The "concrete example" language referred to proof of irreparable harm and was in reference to the appealability of orders denying disqualification *Id.* at 376. The disqualified lawyers have taken this language entirely out of context and argue that this *dicta* should be afforded great precedential weight in the present case.

If the integrity of our judicial system and a lawyer's ethical obligations to the public, the client and the profession, are to have any practical meaning, then proof of actual prejudice must not be used as the only standard. Such would establish an unattainably high threshold for affected parties to cross and would emasculate the public policy of integrity and justice upon which the judicial system rests.

CONCLUSION

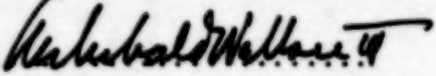
Rule 17.1 of the United States Supreme Court states the considerations this Court will consider in order to grant a Petition for a Writ of Certiorari. The judicial history of the present case does not indicate that this case should be a candidate for review. An eminently qualified panel of United States District Court Judges unanimously agreed that Greitzer & Locks should not be allowed to participate in the Virginia asbestos litigation for fear of tainting the entire litigation. This decision was affirmed by an en banc hearing of the Court of Appeals for the Fourth Circuit. Neither

Court departed from the mainstream of Federal law in making their decisions.

Petitioners argue that 260 Virginia asbestos plaintiffs have been prejudiced by the Order of Disqualification. Why then have no plaintiffs appealed that order? The sincerity behind the petitioners' petition is at best suspect, and one cannot help but wonder whose interests Greitzer & Locks are representing!

The respondents respectfully submit that the Petition for Writ of Certiorari be denied.

H. K. PORTER COMPANY;
SOUTHERN TEXTILE CORPORATION;
RAYMARK INDUSTRIES, INC.;
PITTSBURG CORNING CORPORATION

By 

ARCHIBALD WALLACE, III
SANDS, ANDERSON, MARKS & MILLER
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Post Office Box 1998
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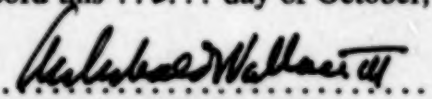
(804) 648-1636

CERTIFICATE

I hereby certify that I have served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to all counsel of record this 15 day of October, 1982.



ARCHIBALD WALLACE, III
Counsel for Respondents

Office - Supreme Court, U.S.
FILED
OCT 4 1982
ALEXANDER L. STEVAS,
CLERK

Docket No. 82-444

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

GREITZER & LOCKS, et al.,

Petitioners

v.

JOHNS-MANVILLE CORPORATION, et al.,

Respondents

RE: PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION OF RESPONDENTS, JOHNS-MANVILLE CORPORATION AND JOHNS-MANVILLE SALES CORPORATION, TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI DURING PENDENCY OF AUTOMATIC STAY UNDER 11 U.S.C. §362(a)(1)

NOW COME Respondents, Johns-Manville Corporation and Johns-Manville Sales Corporation, by counsel, and respectfully suggest that all proceedings in the above matter have been automatically stayed by virtue of 11 U.S.C. §362(a)(1). In support of their suggestion, Respondents note as follows:

1. On August 26, 1982, Johns-Manville Corporation and Johns-Manville Sales Corporation filed a Petition under Chapter 11 of the Bankruptcy Act in the United States Bankruptcy Court for the Southern District of New York. (See copy of Restraining Order attached.)

2. Under 11 U.S.C. §362(a)(1), the filing of this Petition automatically stays all proceedings involving Johns-Manville Corporation and/or Johns-Manville Sales Corporation, directly or indirectly, including these proceedings.

3. The Johns-Manville Respondents anticipate that Petitioners, upon receipt of this Motion, may attempt to sever the Johns-Manville Respondents from this action and then ask this Court to proceed without the Johns-Manville Respondents participating. It is urged that this Court not adopt such procedure. Because the rights of all Respondents in this matter are interwoven and common in nature, to sever out the Johns-Manville Respondents and proceed without them would effectively be to decide their rights without them having been afforded an opportunity to participate in either briefing or oral argument. This would be a special detriment in this instance since the Johns-Manville Respondents have taken the lead in this matter from its inception.

WHEREFORE, Respondents, Johns-Manville Corporation and Johns-Manville Sales Corporation pray this Honorable Court proceed no further in the above matters during the pendency of the automatic stay under 11 U.S.C. §362(a)(1).

JOHNS-MANVILLE CORPORATION and
JOHNS-MANVILLE SALES CORPORATION

By _____
Of Counsel

C. Michael Montgomery
Seawell, Dalton, Hughes & Timms
P. O. Box 119
Norfolk, Virginia 23510
(804) 622-5341

AFFIDAVIT OF SERVICE

THIS DAY came C. Michael Montgomery and having been duly sworn, deposed and stated as follows: That on October 1, 1982, a true copy of the attached Motion was mailed, by depositing same in a United States post office mailbox first class, postage pre-paid, to the following counsel representing the parties or entities indicated: Robert C. Nusbaum, Esquire, Hofheimer, Nusbaum, McPhaul & Brenner, 1010 Plaza One, Post Office 3508, Norfolk, Virginia 23514, Counsel for petitioners; William V. Hoyle, Esquire, Hoyle, Corbett, Hubbard, Smith & Payne, 11048 Warwick Boulevard, Suite 201, Newport News, Virginia 23601, Counsel for Raybestos-Manhatten, Inc.; William B. Eley, Esquire, Wilcox, Savage, Dickson, Hollis & Ely, P.C., Post Office Box 3686, Norfolk, Virginia 23514, Counsel for Eagle-Picher Industries, Inc.; Gerard E. W. Voyer, Esquire, Taylor, Walker & Adams, Post Office Box 3530, Norfolk, Virginia 23514, Counsel for Unarco Industries, Inc.; Stuart Batemen, Esquire, 11048 Warwick Boulevard, Newport News, Virginia 23601, Counsel for Fibreboard Corporation; Archibald Wallace, III, Esquire, Sands, Anderson, Marks & Miller, Post Office Box 1998, Richmond, Virginia 23216, Counsel for H. K. Porter Company; John Y. Pearson, Jr., Esquire, Wilcox, Savage, Dickson, Hollis & Ely, P.C., 1800 Virginia National Bank Building, Norfolk, Virginia 23510, Counsel for The Celotex Corporation; Henry C. Morgan, Jr., Esquire, Pender & Coward, P. O. Box 12027, Norfolk, Virginia, 23502; Counsel for Keene Corporation; Richard S. Glasser, Esquire, Glasser and Glasser, 504 Plaza One Building, Norfolk, Virginia 23510, Counsel for Amicus below; Robert R. Hatten, Esquire, Patten & Wornom, 14749 Warwick Boulevard, Newport News, Virginia 23602, Counsel for Amicus below; Solicitor General, Department of Justice, Washington, D.C. 20530, Counsel for United States of America, Amicus below.

C. Michael Montgomery

STATE OF VIRGINIA
~~City of Norfolk~~, Commonwealth at Large, to-wit:

I, Velma M. McKinney, a Notary Public for the City aforesaid, in the State of Virginia, do hereby certify that C. Michael Montgomery, whose name is signed to the foregoing writing, has acknowledged the same before me in my City aforesaid. Given under my hand this 1st day of October, 1982.

Velma M. McKinney
Notary Public
My Commission Expires: 5/13/86

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

(L&W #6)

In re

JOHNS-MANVILLE CORPORATION,
MANVILLE CORPORATION,
MANVILLE BUILDING MATERIALS CORPORATION,
MANVILLE FOREST PRODUCTS CORPORTAION,
MANVILLE INTERNATIONAL CORPORATION,
MANVILLE EXPORT CORPORATION,
MANVILLE PRODUCTS CORPORATION,
JOHNS-MANVILLE AMIANTE CANADA INC.,
JOHNS-MANVILLE CANADA INC.,
JOHNS-MANVILLE INTERNATIONAL CORPORATION,
JOHNS-MANVILLE SALES CORPORATION,
MANVILLE INTERNATIONAL CANADA, INC.,
MANVILLE CANADA INC.,
MANVILLE INVESTMENT CORPORATION,
MANVILLE PROPERTIES CORPORATION,
ALLAN-DEANE CORPORATION,
KEN-CARYL RANCH CORPORATION,
MANVILLE IDAHO INC.,
MANVILLE SERVICE CORPORATION,
MANVILLE CANADA SERVICE INC.,
SUNBELT CONTRACTORS, INC.,

Debtors.

In Proceedings For A Reorganization Under Chapter 11.

Case Nos. 82 B 11656
Through 82 B 11676 Inclusive

RESTRAINING ORDER

Manville Corporation, Johns-Manville Corporation and the debtors hereinabove named (collectively "Manville"), having filed petitions for reorganization under chapter 11, §301 of the Bankruptcy Code and having been continued in the possession and operation of their businesses and property as debtors in possession pursuant to §§1107 and 1108 of the Bankruptcy Code, and

IT APPEARING that this Court, pursuant to 28 U.S.C.

§1471(e) has exclusive jurisdiction of all of the property of Manville, wherever located, and that this Court pursuant to §§105, 362 and 366 of the Bankruptcy Code may issue any order, process or judgment including, without limitation, this restraining order, as may be necessary or appropriate to carry out the provisions of chapter 11, and after due deliberation and sufficient cause appearing therefor and no adverse interest being represented, it is

NOW, on motion of LEVIN & WEINTRAUB and DAVIS POLK & WARDWELL, attorneys for Manville,

ORDERED, that all persons (including individuals, partnerships and corporations, and all those acting on their behalf), and all governmental units (including the United States of America and any State, Commonwealth, District, Territory, municipality, foreign state, department, agency or instrumentality of the United States, a State, a Commonwealth, a District, a Territory, a municipality, a foreign state, or other foreign or domestic governments, and all those acting on their behalf) be and each of them hereby is stayed, restrained and enjoined from:

1. Commencing or continuing, including the issuance or employment of process, any judicial, administrative or other proceeding against Manville, that was or could have been commenced before the commencement of Manville's chapter 11 cases, or recovering a claim against Manville that arose before the commencement of the chapter 11 cases;

2. Enforcing, against Manville or against property of Manville, a judgment obtained before the commencement of the chapter 11 cases;

3. Taking any act to obtain possession of property of Manville or of property from Manville;

4. Taking any act to create, perfect or enforce any lien against property of Manville;

5. Taking any act to create, perfect or enforce against property of Manville, any lien to the extent that such lien secures a claim that arose before the commencement of the chapter 11 cases;

6. Taking any act to collect, assess or recover a claim against Manville that arose before the commencement of the chapter 11 cases; and

7. Offsetting any debt owing to Manville which arose before the commencement of the chapter 11 cases against any claim against Manville,

and it is further

ORDERED, that all persons and all governmental units, and all those acting on their behalf, including sheriffs, marsnalls, constables and other or similar law enforcement officers and officials, be and each of them hereby is stayed, restrained and enjoined from in any way seizing, attaching, foreclosing upon, levying against or in any other way interfering with any and all of the property of Manville, wherever located, and it is further

ORDERED, that all entities furnishing Manville as of the date of the commencement of the within chapter 11 cases with gas, fuel, telephone services, heat, electrical services, water supply, or any other utility of like kind (collectively the "Utility Companies"), be and each of them hereby is stayed, restrained and enjoined from altering, refusing or discontinuing service to, or

from discriminating against, Manville on the basis that a debt owed by Manville to any of such Utility Companies for services rendered prior to the commencement of these chapter 11 cases was not paid when due or on the basis that Manville fails to furnish adequate assurance of future payment in the form of a deposit within twenty (20) days subsequent to the commencement of these chapter 11 cases; and the Court hereby finds that under the circumstances present in the within cases, and particularly in light of Manville's unencumbered asset base, an administrative claim constitutes adequate assurance of future payment in accordance with §366(b) of the Bankruptcy Code, and it is further

ORDERED, that Manville be and it hereby is authorized to expend a sum not exceeding $100,000 in the aggregate to monitor and enforce the automatic stay provisions contained in §362 of the Bankruptcy Code and this Order, including but not limited to making payments to local counsel for such purposes, and it is further

ORDERED, that on request of a party in interest, and after not less than ten (10) days written notice to LEVIN & WEINTRAUB and DAVIS POLK & WARDWELL, attorneys for Manville, and after a hearing, this Court, may consider granting relief from the restraints imposed herein in the event it be necessary, appropriate and warranted to so terminate, annul, modify or condition the injunctive relief granted herein, and it is further

ORDERED, that Manville be and it hereby is directed to

serve a copy hereof together with notice of entry hereof upon all known Utility Companies within ten (10) days of the date hereof, and it is further

Dated: New York, New York
August , 1982

BURTON R. LIFLAND

UNITED STATES BANKRUPTCY JUDGE

No objection
U.S. Trustee
By: s/ Harold Jones

ORDERED, that this Order shall not affect a governmental unit's police or regulatory power or any other exception to the automatic stay contained in § 362 (b) of the Bankruptcy Code.

Office - Supreme Court, U.S.
FILED
NOV 4 1982
ALEXANDER L. STEVAS,
CLERK

Docket No. 82-444

In The

In the Supreme Court of the United States

October Term, 1982

GREITZER & LOCKS, GENE LOCKS and MARTIN GREITZER; NEIL R. PETERSON,

Petitioners,

v.

RAYMARK INDUSTRIES, INC.; PITTSBURG CORNING CORPORATION; H.K. PORTER COMPANY; SOUTHERN TEXTILE CORPORATION,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Docket No. 82-444

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Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS FOR THE FOURTH CIRCUIT

INTRODUCTION

This paper is a reply to the Brief in Opposition to Petition for a Writ of Certiorari filed by four respondent manufacturers in this matter. In the spirit of this Court's rule limiting Petitioners' Reply Brief to new material, we are responding to three crucial points raised by Respondents in their Brief:

I. The non-existence of confidential material;

II. The absolutely incredible suggestion that the Justice Department was coerced into issuing a waiver of imputed disqualification; and

III. The mind-boggling opportunity for this Court to resolve the overwhelming judicial log jam deliberately created by certain asbestos manufacturers.

The Brief submitted by the manufacturers should have provided them with a golden opportunity to demonstrate the soundness of the District Court's decision and show this Court why further review is unnecessary. Instead, it has provided Petitioners with a providential opportunity to point out to this Court the ridiculous level of proof on which the erroneous ouster was predicated. Nothing could be more obviously contrived and misleading than the references in Respondents' Brief to support two key propositions on which they base their argument: 1) the existence of the manufacturers' proprietary information known to the United States government and Peterson, and 2) the Justice Department's somehow being forced by a former employee into waiving the disqualification of Greitzer and Locks.

The intensive review this matter deserves may not be possible at this level. However, such a review would disclose that the facts and propositions relied on below for ouster had no more substance or significance than the tiny shreds of so-called evidence pointed out in the Opposition Brief. It is shockingly replete with unsupported claims that Peterson possesses confidential information which cannot be protected by the screen established by Greitzer and Locks and still expressly approved by the Justice Department. Although they are unable to cite any secret information known to Peterson and not the plaintiffs, except for the noted Glover settlement[1], the manufacturers persist in their argument that Peterson's employers, Greitzer and Locks, should be disqualified from representing 260 asbestos plaintiffs, many of whose cases have been handled by said firm for over five years.

It is an uncontroverted principle of disqualification law that the burden of proof rests upon the party seeking dis-

[1] The Fourth Circuit's majority opinion deals with the issue of the Glover settlement, showing its irrelevance to other asbestos litigation. (Appendix 31,32.)

qualification to show the existence of confidential information if the lawyer who is the subject of the proceedings never represented the moving party. See *Sierra Vista Hospital, Inc., et al.* v. *The United States*, 639 F.2d 749 (Ct.Cl. 1981); *Fred Weber, Inc.* v. *Shell Oil Company*, 566 F.2d 602 (8th Cir. 1977), cert. den. 436 U.S. 905 (1978). Absent confidences running to the moving party, there is no presumption in favor of disqualification. The manufacturers have not even approached this burden except by innuendo and empty allegations.

I. THE NON-EXISTENCE OF CONFIDENTIAL INFORMATION

A blatant illustration of the baselessness of Respondents' position can be seen by examining one of the central theses of their Opposition Brief and a point which constituted one-third of their time on oral argument during the *en banc* hearing. They contend that evidence submitted at the half day evidentiary hearing before the District Court established that:

> Proprietary information about the manufacturers was disclosed to the Navy Bureau of Medicine and Surgery with the understanding that it remain confidential. Peterson had access to this information and his subordinates had direct knowledge of it. Respondents' Brief in Opposition to Petition for Certiorari at 7.

The sole authority cited by Respondents in support of this allegation is Page 778 of the Record filed in the Court of Appeals. "Page 778" consists of a one page excerpt from a deposition identified by the manufacturers as "Page 5 of defendants' exhibit number 350." Record at iii. To assist this Court in evaluating the weight to be accorded Respondents' claims, Petitioners have included as Supplemental Appendix A, pages 3-8 of the deposition from which the page is extracted.

The passage quoted and relied upon by Respondents as the only support for their claim that Peterson possesses proprietary information is not found in a deposition which was

taken *for these proceedings*. Nowhere was the information shown to ever have been communicated to Peterson, and it has not been established that the documents referred to were withheld from others. The passage consists of one paragraph of unsworn remarks by Peter Nowinski, a Justice Department Attorney, regarding documents subpoenaed by the manufacturers for the deposition of a witness, Dr. Belianca. Nowhere does Dr. Bellanca testify regarding proprietary information. Neither in his deposition nor in the countless others similarly filed and *not read*, nor in the evidentiary hearing before the District Court, did any witness testify regarding information proprietary to the manufacturers held by the Navy Bureau of Medicine and Surgery. It is surely the acid test of the insignificance of this proprietary information that Peter Nowinski testified for Greitzer and Locks at the evidentiary hearing below, and was never examined on this point by the defendant manufacturers. Nowhere is there any proof of its *relevance*, or that it is protected from discovery.

Furthermore, it is extremely unlikely that the District Court relied upon the unsupported reference to the so-called proprietary information, or that the District Court even knew that such a statement was buried in the record. Nowhere is it alluded to in the District Court's opinion. There is no reason to believe it was ever read to the Court or distinguished from the hundreds of similar documents simply introduced to the Court by the boxload.

Despite numerous opportunities to present *proof* of confidential and proprietary information, the manufacturers have not produced one single document or exhibit, in open court or in camera, to demonstrate that such information exists. This Court can be certain that with the manufacturers' vast resources and perseverance, they would have produced proof of proprietary information about the manufacturers had it existed. Where are the documents referred to in page 778 of the record? Even if there were such "proprietary information," a mere second year law student would recognize that it would be readily discoverable by asbestos plaintiffs, as was pointed out from the bench, in the *en banc* hearing below.

II. INDEPENDENCE OF THE GOVERNMENT'S WAIVER

The manufacturers would also have this Court believe that the Department of Justice, the nation's largest litigant, was strong-armed by Peterson and his attorneys into issuing the waiver. (Brief of Respondents at 5, 6 and 20.) References to the following cross-examination of John J. Farley, Justice Department Attorney, by counsel for Johns-Manville are cited to support this absurd argument:

> By Mr. Montgomery:
>
> Q. In fact, the meeting . . . Mr. Rogovin requested that the meeting take place before the Office of Legal Counsel issue its memorandum; did he not?
>
> Mr. Farley
>
> A. I don't know that of my own knowledge.
>
> Q. Did you hear Mrs. Patricia King state that last week?
>
> A. Yes, sir.
>
> Q. Do you have any knowledge or information to refute that?
>
> A. No.
>
> Record at 344-345.

Mr. Farley acknowledged that he had no knowledge to refute Mrs. Patricia King's statement that a meeting was requested before the Office of Legal Counsel issued its memorandum. There is no evidence of pressure or coercion. The manufacturers completely distort and take out of context the testimony of Mr. Farley and Mrs. King by suggesting that the Justice Department would or could be overborne. This is just another typical example of how Respondents seek to impugn Peterson and those associated with him by misleading references to irrelevant portions of testimony taken out of context.

It is clear from these passages, which are typical of the arguments made by the manufacturers throughout these proceedings, that their entire effort is based upon fallacy and mere assumption. The so-called facts relied upon by Respondents are nothing more than a body of allegations, repeated time and again to give them an aura of credibility. One looks in vain through the pages of the District Court opinion for any hard evidence cited in support of the manufacturers' allegations or the Court's decision.

This Court is a forum where counsel fire their best and most persuasive shots. But the manufacturers have come up with nothing more than (i) remarks from other litigation which likely never came to the District Court's attention, and (ii) "evidence" of the Justice Department's capitulation in the form of a meaningless statement by one attorney that he could not refute another's testimony that a meeting took place prior to issuance of the waiver.

III. OPPORTUNITY FOR COURT TO RESOLVE NATIONWIDE UNCERTAINTY REGARDING STAY

Respondents have inappropriately suggested that this Court should delay action on this Petition due to the fact that Johns-Manville had filed a bankruptcy petition. Petitioners have been tempted to include in this Reply the short narrative and argument submitted to this Court in response to Johns-Manville's Motion to Defer Consideration of Petition for Writ of Certiorari During Pendancy of Automatic Stay Under 11 U.S.C. ¶362(a)(1). The paper succinctly points out the delays and history of this matter, perhaps more thoroughly than does our original Petition. It also addresses Manville's argument regarding the applicability of the Bankruptcy Code's automatic stay to these proceedings and the Respondents' argument relating to the severance of Johns-Manville from its co-defendants.

In lieu of repeating their argument herein, Petitioners are delivering to the Clerk additional copies of the previously filed paper in the hope that it will be distributed to all mem-

bers of the Court and considered in conjunction with this Reply.[2]

The manufacturers are endeavoring to make the stay arguments in every forum. Granting an appeal to your Petitioners will facilitate consideration of the stay issue, which has been called to this Court's attention by the manufacturers. It gives this Court an immediate opportunity to resolve an issue now confronting the judicial system nationwide, with voluntary bankruptcy petitions already filed by two manufacturers. The District Courts, the Bankruptcy Courts and the Appeals Courts will be inundated with staggering numbers of cases on this issue alone. The potential economy to the judicial system and the tremendous service to the bench and bar which could be served by this Court's resolution of the stay issue is breathtaking. If this Court resolves the stay issue in connection with this matter, it can clear many courts throughout the country of stymied cases and cluttered dockets. This Court can prevent and relieve the huge log jams and render a tremendous service to countless plaintiffs who await trial while the courts decide whether the Bankruptcy Code's stay applies to the many solvent manufacturers.

CONCLUSION

Surely this Court is too astute to be taken in by the repetition of allegations as though they were proven facts. The facts that (i) the District Court required no proof and (ii) that the manufacturers continue to distort the evidence and to lead the Courts into error go to the heart of the need for this Court to review the process for the disqualification of counsel.

Where have the manufacturers demonstrated that they have satisfied their burden of proof? Their failure to meet

---

[2] The United States District Court for the Eastern District of Virginia, in response to a similar motion, held that the §362(a) stay provision *does not* apply to Johns-Manville's co-defendants. Pages 1-3 of the District Court's opinion are included as Supplemental Appendix B.

this fundamental burden is a reminder that the original Motion to Disqualify was filed without the supporting affidavit required by law. When the issue was raised by Petitioners, an affidavit was belatedly signed and filed by Johns-Manville's attorney and subsequently withdrawn over Petitioners' vehement protests, preventing Petitioners from showing how patently unsupported were its allegations. (Record at 279.) The District Court, painfully aware of the inadequacy of the Johns-Manville affidavit, allowed its withdrawal. In addition, the Court virtually required the parties to hold an evidentiary hearing, wherein the only evidence offered by the manufacturers consisted of boxloads of exhibits related to other proceedings. From a review of the District Court's decision, it is questionable whether the Court ever considered such evidence.

Notwithstanding Respondents' arguments, no one can dispute the fact that there is a total lack of evidence of confidential information in the record. The manufacturers fail to show this Court how the record supports their arguments and satisfies their burden of proof. Petitioners hope that by presenting these uncontrovertible aspects of this matter, this Court can be persuaded to grant certiorari to review the disqualification proceedings to give a final chance for rescue from the harsh and improvident decision which dashed the hopes of 260 plaintiffs in the name of a principle which does not exist.

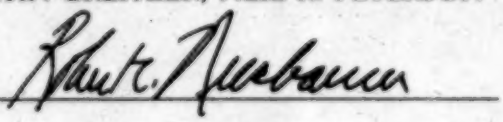
Any question of appearance of impropriety fades away when analyzed in light of the factual underpinnings of the manufacturers' motion to disqualify and the relationships among the asbestos litigants. Petitioners have always agreed that Peterson's activities, as recited by Respondents, are a sufficient basis for disqualifying him from the Virginia litigation. However, those activities become virtually meaningless vis-a-vis Greitzer & Locks, when it is recognized that for all practical purposes, the United States is now permanently and totally out of this litigation. This is so despite the prolonged efforts of the manufacturers to keep the United States involved, contrary to convincing evidence and well estab-

lished law affording the government a defense. Petitioners have made it clear to every court, and it is not disputed, that the manufacturers and the government were never litigating partners, but were always adversaries, not possessed of the other's confidences, except perhaps in one or two very limited and unimportant minor respects which could not conceivably confer any litigating advantage. A careful review of the facts, or lack of facts, set forth in Respondents' Brief and the posture of the parties in the underlying litigation makes it clear that even the "mere possibility of taint" is little more than a figment of the manufacturers' imagination unsupported by the record, and erroneously relied upon by the District Court below.

By granting a writ, this Court can also put to rest the issue of the stay which is plaguing the entire country and threatening to undermine the chances for countless sick and dying plaintiffs to recover against solvent companies.

Petitioners respectfully submit that their Petition for Writ of Certiorari be granted.

GREITZER & LOCKS, GENE LOCKS and
MARTIN GREITZER, NEIL R. PETERSON

By 

Robert C. Nusbaum
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HOFHEIMER, NUSBAUM, McPHAUL & BRENNER
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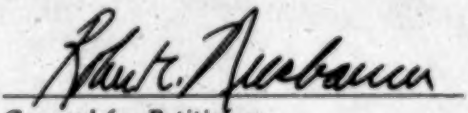
CERTIFICATE

I hereby certify that I have served three (3) copies of the foregoing Reply to Brief in Opposition to Petition for Writ of Certiorari to all counsel of record this 3rd day of November, 1982.



Counsel for Petitioners

Docket No. 82-444

In The

In the Supreme Court of the United States

October Term, 1982

GREITZER & LOCKS, GENE LOCKS and
MARTIN GREITZER; NEIL R. PETERSON,
Petitioners,

v.

RAYMARK INDUSTRIES, INC.;
PITTSBURG CORNING CORPORATION;
H.K. PORTER COMPANY;
SOUTHERN TEXTILE CORPORATION,
Respondents.

SUPPLEMENTAL APPENDIX TO REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OLIVER H. VAN BUSKIRK	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 79-548
	:	
THE UNITED STATES OF AMERICA, *et al*	:	
Defendants	:	
	:	
ZELPHIA D. CORSETTE	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 78-3071
	:	
JOHNS-MANVILLE CORP.	:	
JOHNS-MANVILLE SALES CORP.	:	
and	:	
OWENS-CORNING	:	
FIBERGLAS CORP.	:	
Defendants	:	

Washington, D.C.
Monday, August 20, 19 . .

Deposition of

DR. JOSEPH J. BELLANCA,

a witness, called for examination by counsel for a defendant, JOHNS-MANVILLE, pursuant to Notice, at the Washington Hilton Hotel.

Thereupon,

DR. JOSEPH J. BELLANCA,

a witness, was called for examination by counsel for a defendant, Johns-Manville and, after having been duly sworn by the Notary was examined and testified as follows:

MR. NOWINSKI: Tom, before you begin, I would like to make a couple of statements. The first is to give advice to everyone in attendance that Dr. Bellanca was produced at your request to testify as a fact witness at this deposition and he has been produced in this capacity as an individual and not as a representative of the United States. He has not been designated by the United States as an officer, director, managing agent, authorized to make any statement by or on behalf of the United States on any subject. And his testimony that he may give at this deposition is outside of the scope of the agency or his employment by the United States, notwithstanding in the event of the death or inability of the witness to testify, pursuant to Section 804A in the Federal Rules of Evidence, this deposition will not be used for any purpose against the United States in any proceeding to which the United States is not presently a party and thus has no meaningful opportunity or notice to develop the witness's testimony.

MR. DeLORENZO: Off the record.

(Discussion off the record.)

MR. DeLORENZO: Do you have something else?

MR. O'CONNOR: That is your position. That is what you are saying.

MR. NOWINSKI: Yes.

MR. O'CONNOR: No one is bound by that. The Court will decide that.

MR. LOCKS: Did everyone stipulate to that?

MR. O'CONNOR: No.

MR. DeLORENZO: Do you have anything else to say?

MR. NOWINSKI: Yes, I do. I want to add a statement in regard to the request for production of documents. We have not brought any documents with us and have none with us at the time. The documents as described have been marshalled and I hope to begin producing documents after the noon recess.

A search was conducted for all documents which mentioned or were related to or appeared to be related to the broad subject of asbestos. Dr. Bellanca is the person who initiated and supervised that search. The search included archival records of the Navy's Bureau of Medicine & Surgery. The search was made at the request of the Department of Justice, and documents were searched for and marshalled up until 9:00 o'clock p.m. last night, which is in part why we don't have them available this morning. The documents that have been marshalled are estimated to consist of approximately 12,000 pieces of paper and, as I mentioned, they are being reviewed right now by representatives of the Department to determine whether any privileges are applicable and for relevancy.

And I will tell you now that there are some documents which reflect manufacturers' proprietary information. Apparently, the Navy Bureau of Medicine & Surgery was permitted to obtain such information upon representations that it would be maintained as confidential. And I have asked that such documents be polled from the group marshalled by Bureau of Medicine, and I would be happy to discuss them with you to see if perhaps parts can be expunged or the manufacturers' consent can be had to release them.

As of this moment, there is one relatively small group of documents which has not been marshalled, and it consists

of about the last six months of records that have been received or generated by the Special Correspondence Section of Bureau of Medicine, primarily consisting of what I think can fairly be characterized as routine congressional and individual medical inquiries. And as I understand it, most of such inquiries are responded to with a form letter. If you decide you don't want that, let me know so that we won't have to go any further than necessary. If you do want it, we anticipate now we can have it in a couple of days.

I also want to address specifically some of the categories in the subpoena which has been quashed but nevertheless, I think is appropriate to avoid any misunderstanding about the effort we have made. First of all, in category number four of the attachment to the subpoena, request was made for all documents in Dr. Bellanca's custody arising from inspections, tours, and inspections to naval yards or shipyards where asbestos containing products were observed.

The Government's position was that a claim of privilege attaches to certain post-1969 audits or investigations of naval shipyards to determine compliance with Navy instructions and regulations regarding the use of substitute materials and personal protection plans. These documents will not be included in those produced.

MR. DeLORENZO: Are you done?

MR. NOWINSKI: No, I have a couple more.

MR. DeLORENZO: Go through the whole thing and I will then make some statements.

MR. NOWINSKI: In regard to category number six which requested all personal documents which come within the scope of the preceding five descriptions in the attachment, I want to advise that the Doctor made no effort to review his personal textbooks or what he refers to as his "Reprint File," which is the file he maintains; and consists of articles he has torn out of various medical journals from time to time.

Finally, with respect to category number seven, which requests documents from all subordinate units, agencies, shipyards, or other governmental organizations subordinate to the Bureau of Medicine & Surgery, I want to inform you that we made no attempt to search any so-called subordinate commands such as hospitals, dispensaries, clinics, Naval Research, medical research laboratories, or other medical facilities under the cognizance of the Navy's Bureau of Medicine & Surgery, and which exist throughout the world.

Lastly, I want to state for the record that the Government requested a postponement of this deposition for the reason at some point in time last week it appeared we would not be in a position to make available all of the documents that we deemed responsive to your requests at the beginning of the deposition, and suggested that it would save everybody time and inconvenience if we could complete that production before and allow you a time to review the documents before convening the deposition. You declined that offer or suggestion. But it is the Government's position we would vigorously oppose any effort to re-depose Dr. Bellanca, for the reason that you didn't have all the documents available to you when you first convened the deposition, because we would have preferred to have done it in another way.

MR. DeLORENZO: Okay. First, the Special Correspondence Section material I would like to have that produced. I would like you to keep searching for that.

MR. NOWINSKI: All right.

MR. DeLORENZO: Number two, I believe on item 4 on the attachment to the subpoena, you indicated that that is the item that you have a claim of privilege to after 1969. Is that correct?

MR. NOWINSKI: Well, I referred, hopefully, to specific post-1969 audits or investigations which might have been encompassed in your description number 4.

MR. DeLORENZO: What privilege is that?

MR. NOWINSKI: Well, act of relevance and Section 407 of the Federal Evidence Code relating to the public policy affecting . . .

SUPPLEMENTAL APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

JAMES T. OMAN, FRED R. WALKER, HUGH V. REYNOLDS, and WILLIE GIBBONS, *Plaintiff,*	)	
v.	)	CIVIL ACTION NO. 82-22-NN
JOHNS-MANVILLE CORP.; JOHNS-MANVILLE SALES CORPORATION, Successor by merger with Johns-Manville Products Corporation; RAYBESTOS-MANHATTAN, INC.; H.K. PORTER COMPANY; SOUTHERN TEXTILE CORPORATION; and PITTSBURG CORNING CORPORATION; *Defendants.*	)	

MEMORANDUM OPINION

The defendants have raised several post-jury verdict issues seeking to stay further proceedings or to set the verdict aside. The parties have briefed the issues and they are now ripe for decision.

MOTION TO STAY ENTRY OF JUDGMENT
(Filed by all defendants)

The defendants have moved that this Court stay all further proceedings against them, including the entry of judgment, because of the recent Chapter 11 reorganization filing of the defendant Johns-Manville Corp. The defendant relies on 11 U.S.C. § 362(a)(1) which provides:

> A petition . . . operates as a stay to all entities, of:
>
> (1) . . . Proceeding against the debtor or other proceeding against the debtor that was . . . commence[d] before the commencement of the case under this title . . .

The defendants argue that when 362(a) refers to "all entities" it is referring to codefendants who are also liable to a creditor of the bankrupt. The Court believes this to be an overly expansive reading of the statute.

The defendant cites as support the case of *In Re White Motor Credit Corp.*, 11 Bankr. Rep. 294 (Bnkr. N.D. Ohio 1981). In *White*, the Court did stay all proceedings in which the debtor was involved. The Court stated that the stay operates as "a windfall benefit to codefendants." However, without commenting on the correctness of the *White* decision, this Court does not feel compelled to follow it. The Court feels the better course to follow is to give the statute a literal reading. The statute refers to proceedings against the *debtor*. This is in line with the Code's desire to relieve the debtor of some of his financial burdens and thus allow the debtor to get his finances in order. It is also apparent from a literal reading of "to all entities" refers to those persons (creditors) who may be acting adverse to the debtor's rights. It is difficult for the Court to see how staying proceedings involving codefendants or staying the entry of judgment against codefendants will help the debtor at all. More importantly, it is difficult to see how not staying the entry of judgment will prejudice the debtor in any way. Certainly, such has not been established in this case.

There are hundreds of asbestos cases against numerous defendants pending in this Court. Johns-Manville has filed for reorganization and not for straight bankruptcy under the Act. It might take some months for the Bankruptcy Court to determine if Johns-Manville is in fact in such present financial jeopardy as to entitle it to proceed under the Act. If the Bankruptcy Court determined that Johns-Manville was ineligible and dismissed the petition, the temptation might be great for another defendant to follow the same path as had been followed by Johns-Manville. This could be done by each defendant consecutively, thus delaying the rights of the plaintiffs to a reasonably prompt adjudication of their Complaints.

/s/ J. Calvitt Clarke, Jr.

United States District Judge

October 20, 1982
Norfolk, Virginia

Supreme Court, U.S.
FILED
NOV 4 1982
ALEXANDER L. STEVAS,
CLERK

DOCKET NO. 82-444

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GREITZER & LOCKS, et al.,

Petitioners

v.

JOHNS-MANVILLE CORPORATION, et al.,

Respondents

RE: PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

RESPONSE OF PETITIONERS TO MOTION OF RESPONDENTS, JOHNS-MANVILLE CORPORATION AND JOHNS-MANVILLE SALES CORPORATION, TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI DURING PENDENCY OF AUTOMATIC STAY UNDER 11 U.S.C. §362(a)(1)

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STATUTES

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Petitioners, Greitzer and Locks, Gene Locks, Martin Greitzer and Neil R. Peterson, by counsel, for their Response to the Motion of Johns-Manville Corporation and Johns-Manville Sales Corporation ("Manville") to Defer Consideration of Petition for Writ of Certiorari During Pendency of Automatic Stay under 11 U.S.C. §362(a)(1), state as follows:

A. OVERVIEW OF CASE

I. FACTUAL BACKGROUND

In the Eastern District of Virginia, there are approximately 300 asbestos plaintiffs suing Manville and a number of other manufacturers and distributors, jointly and severally, for personal injury or wrongful death. Many of these cases are now in their sixth year. In the great majority of instances the plaintiffs worked at either a United States Navy facility in Portsmouth, Virginia (called the Norfolk Naval Shipyard), or at a private shipyard in Newport News, Virginia. In nearly every case, the worker's asbestos related disability has been long and firmly established under the Federal Employees Compensation Act (as to federal workers) or the Virginia Workmen's Compensation Act (private shipyard workers).

The first 40 cases came to Gene Locks, a Philadelphia attorney, as a result of a talk he was invited to make in 1976 at the Portsmouth Naval Shipyard, detailing his research into asbestos disease and manufacturer liability in Pennsylvania. Mr. Locks engaged a young lawyer named Richard Glasser to serve as local counsel in those cases. Mr. Glasser had no previous experience in asbestos cases, and very little previous experience in tort claims. Subsequent events led other local claimants to engage the services of Locks and Glasser. Some such claimants came from the Newport News private shipyard. In those cases, a young lawyer named Robert Hatten was local counsel. Glasser and Hatten worked together on pleadings, discovery and trial preparation, under Locks' supervision and direction, with Locks participating personally as lead counsel at nearly every level, but especially (i) in the so-called "national discovery" of each side's major witnesses on the liability and medical issues, (ii) in conducting those several cases tried, and (iii) in all serious settlement negotiations through 1980.

Mr. Locks is one of two partners in a Philadelphia firm that had only six lawyers (two partners and four associates) in 1980, but had more than 1200 asbestos claims, and was being offered others it could not find time to handle. During 1979 and 1980, Locks had become well acquainted with Neil Peterson, a senior Justice Department trial lawyer who was defending the interests of the Navy Department in approximately 233 third party actions filed by the defendant asbestos manufacturers in cases arising in the Norfolk Naval Shipyard or from repair or construction of Naval vessels in the Newport News private shipyard. It was always reasonably clear, and is now judicially well established, that the United States has no liability or financial exposure in any of those cases. It has yet to pay a dime. Defendants keep insisting they have some viable theory of liability but have con-

sistently lost all arguments, and have finally voluntarily dismissed all the Norfolk third party actions and some of the others. Under court direction to file all possible claims by a February 1979 deadline, approximately 19 direct actions against the United States were filed in Newport News by asbestos workers for protective purposes. These were officially stayed within 90 days (by agreement) and remained utterly dormant until dismissed earlier in 1982. In no active cases did Peterson and his associates make common cause or participate in discovery with counsel for defendants. This followed because the United States participated, by law, in most recoveries against the manufacturers, recovering amounts, pursuant to 5 U.S.C. 8132, it had paid to the plaintiffs, and would pay, under F.E.C.A. Moreover, proving the direct and primary negligence of the manufacturers would completely exonerate the United States as a matter of law from the third party claims for indemnity filed against it by the manufacturers.

Beleaguered with a huge caseload in July, 1980, Gene Locks learned that Neil Peterson was considering entry into private practice. Recognizing that Peterson, as a seasoned trial lawyer knowledgeable about asbestos, could step immediately into several hundred pending cases against private manufacturers in cases outside Virginia where the United States was in no way involved, Locks offered to employ him. Peterson immediately notified and consulted the appropriate officials at the Justice Department to chart a proper and ethical course of action to avoid for himself any improper conduct, and to protect his future employers from imputed disqualification. This is well documented in the record, and resulted in a "screen" which was, and still is, faithfully observed, to the full and current satisfaction of the Justice Department. After inexplicable bureaucratic delays, these arrangements ultimately resulted in the issuance of a formal waiver of imputed disqualification for Greitzer and Locks, filed in January, 1981, in the Virginia disqualification proceedings

brought by the manufacturers in November 1980.

The one and only "lapse" chargeable to Neil Peterson or Greitzer and Locks is the unintended discourtesy to the United States District Court in failing (i) to give the judges notice of Peterson's withdrawal from representing the United States, and (ii) to explain his employment to serve Greitzer and Locks ELSEWHERE, and the screening arrangements. In its opinion which ordered imputed disqualification after all the facts were in evidence, the District Court's opinion stated, with ill-disguised pique, that it would have reached the same result even if it had been informed in advance.

II. JOHNS-MANVILLE STRATEGY

At every stage, and in every way, utilizing all the devices and opportunities known to lawyers, Johns-Manville has delayed and dragged out these cases. Never has it opposed any continuance. Never has it opposed any formal or informal stay. Never has it sought to expedite any trial or hearing; to the contrary, it has welcomed every delay and agreed to any request for same, and come forth with many "sound reasons" therefor.

When United States District Court Judge Calvitt Clarke set aside four verdicts as "excessive" in the Oman, Walker asbestos cases and ruled erroneously on the statute of limitations and other issues, Johns-Manville was delighted for the opportunity to see all future trials held in abeyance 15 months or more while the Fourth Circuit reversed and Johns-Manville petitioned for Certiorari (denied) to the United States Supreme Court. The Disqualification Motion came as a godsend, offering another year or two of delay. It was filed without one single word of prior conversation or correspondence with Peterson, Greitzer and Locks, local counsel or the Justice Department!

III. MERITS OF THE DISQUALIFICATION MOTION

The order of disqualification entered by the trial court was REVERSED, in a 2-1 decision, by the Fourth Circuit Court of Appeals. The majority opinion, written by a judge with major experience in asbestos claims, is a model of clarity and soundness. (See Appendix "A") It is attached hereto as a succinct and compelling statement of the law and facts, to be contrasted with the somewhat emotional dissent which dwells upon, and indeed magnifies, erroneous and unfounded inferences in the District Court opinion. To his credit, the dissenting judge candidly acknowledges (i) his inclination to attach a high degree of presumptive infallibility to the findings of his brethren below, and (ii) his amazing failure to discuss the relevant A.B.A. Canons (and the leading cases construing them). To the astonishment of all, the Court of Appeals granted an en banc hearing, and found itself evenly divided, 5 to 5, thereby technically affirming the District Court, and giving yet another reprieve to the manufacturers, but for the decision of the United States District Court to proceed with trials in view of the declining health and death of many of the plaintiffs, after four or five years of delay.

As a footnote, the Oman, Walker cases (4) have now been retried in the District Court on more favorable law and rulings and with more evidence of progression of the diseases, but without the expertise of Gene Locks, who had obtained verdicts totalling $1,720,000.00. The verdicts obtained by local counsel at re-trial amounted to $829,000.00, or less than half the amount Locks obtained with less favorable evidence.

IV. THE "BANKRUPTCY PLOY"

Johns-Manville is undoubtedly the most solvent manufacturer in history to seek relief from accountability for its misdeeds by

invoking the Bankruptcy Act. Its efforts to insulate its assets from long-suffering asbestos plaintiffs is one of the sorriest chapters in American industrial history. However, regardless of its success or failure in obtaining substantive relief, Johns-Manville, by the time it exhausts all appeals, will have bought a further delay of at least two years in holding these plaintiffs at bay, a fact which has financial value worth tens or hundreds of millions of dollars to Johns-Manville, and conversely, will fatally abort the rights of many dying victims and have a devastating effect on their rights and those of their dependents.

B. RELIEF SOUGHT

I. DENY RESPONDENTS' MOTION

The Restraining Order entered by the United States Bankruptcy Court for the Southern District of New York (attached to Respondents' motion) does not apply to these proceedings. The order traces the language of 11 U.S.C. §362(a)(1) of the Bankruptcy Code, which enjoins a party from

> Commencing or continuing, including the issuance or employment of process, and judicial, administrative or other proceeding against Manville, that was or could have been commenced before the commencement of Manville's Chapter 11 cases . . . (emphasis added).

Contrary to Respondents' suggestion in Paragraph two of their motion that the filing of the Chapter 11 Petition "automatically" stays "all" proceedings involving Johns-Manville . . ., directly or indirectly," the statute and the order clearly contemplate a more limited application; otherwise, there would be no need to enumerate the particular proceedings covered by the stay. The use of the word "against" in the Bankruptcy Court's order, rather than "involving"

limits the scope of the §362(a)(1) stay in paragraph one to actions commenced against Manville. The Motion to Disqualify Counsel, which is the subject of these proceedings, was initiated and prosecuted by Manville and the other manufacturers against Petitioners. Petitioners are not continuing an action "against" Respondents, but are merely exercising their statutory right to appeal an adverse final decision in a wholly collateral matter which was brought "by" Manville and others.

Deferring these proceedings pending the outcome of the Manville reorganization would constitute a gross misapplication of the 11 U.S.C. §362 stay. The purpose of the automatic stay provision in proceedings against a debtor is to give the insolvent debtor an opportunity to take stock and formulate plans for repayment and reorganization with protection from "a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts." In re Frigitemp Corp., 8 B.R. 284 (D.C.N.Y. 1981). These proceedings, which are collateral to the underlying litigation, as set forth in detail in our Petition for Certiorari, have nothing to do with adjudicating Manville's liability and will have no effect on the corporations' assets. A final determination will merely resolve the question of whether Gene Locks may represent some 260 asbestos plaintiffs in trials which are proceeding against a number of asbestos manufacturers other than Manville in the Eastern District of Virginia on a monthly schedule.

The stay mechanism was not designed to allow major corporations to invoke its protection solely for tactical and delay purposes in a proceeding initiated in part by those corporations. This Court should be particularly suspect of the Manville corporations' motivation for filing this motion, since they have taken the opposite

positions when their purpose was served. For example, they have specifically requested that the Bankruptcy Court lift an automatic stay in bankruptcy to file appeals in three (3) cases and are currently involved in asbestos related litigation against their insurance carrier in California, undeterred and unaffected by the stay in their bankruptcy proceeding.

It is not Petitioner's position that Manville's participation in those matters is improper. In fact, "nothing in the Bankruptcy Act stays or prevents the petitioner before the Bankruptcy Court from filing claims against other parties." Engine Rebuilders v. Seven Seas Import-Export, 615 P. 2d 871, 874 (Mont. 1980). It is, however, more than noteworthy that Manville is not the typical bankrupt with no assets; it is a major, viable corporation with the financial resources to manipulate the protective devices of the Bankruptcy Act when its purpose is served.

II. SEVER JOHNS-MANVILLE

The Johns-Manville corporations should be severed from this action if this Court feels that the Bankruptcy law has any application to these proceedings. This matter has been pending since the manufacturers filed their motion in November of 1980. Petitioners submit that the four remaining defendants who have been involved for nearly two years are perfectly capable of dealing with the issues, which have been fully briefed in the District and Appeals Courts. In addition, counsel for two of the four remaining manufacturers, H. K. Porter Company, Inc., and Southern Tile Corporation, participated in the most recent oral argument before the Fourth Circuit Court of Appeals.

The District Court for the Eastern District of Virginia (wherein nearly 260 asbestos plaintiffs await trial without the benefit of counsel of choice as a result of these proceedings) has refused

to stay such actions, and, "to avoid delay, prejudice and inconvenience," (See Exhibit "B") has allowed the cases to proceed to trial by severing Unarco Industries, Inc. and Manville, who have invoked Chapter 11 protection. It would not only be inconsistent, but ludicrous to sever Manville from ongoing trials and deny the asbestos plaintiffs and counsel their statutory right to pursue an appeal of an action instituted by Manville and its co-defendants. It is also instructive that a majority of the manufacturers whom the plaintiffs now face in the District Court did not join Manville in the Petition for Rehearing of these proceedings in the Court of Appeals.

These proceedings do not involve a demand for monetary damages; they do not affect the issue of Manville's liability. If the manufacturers' position on the merits on appeal is sound, an adjudication to that effect can only benefit respondents unless their entire purpose is the obstruction of justice by preventing resolution of this matter. If their position is unsound and the courts below should be reversed, it would be an obstruction of justice to refuse to sever Manville from the other manufacturers.

WHEREFORE, Petitioners respectfully request that the Motion of Respondents, John-Manville Corporation and Johns-Manville Sales Corporation be denied, and that in the alternative, said Respondents be severed from these proceedings.

GREITZER & LOCKS, GENE LOCKS, MARTIN GREITZER and NEIL R. PETERSON

By: Linda Laibstain
Of Counsel

Robert C. Nusbaum
Linda S. Laibstain
HOFHEIMER, NUSBAUM, McPHAUL & BRENNER
1010 Plaza One
P. O. Box 3508
Norfolk, Virginia 23514

CERTIFICATE

This is to certify that pursuant to Rule 28.5(b), Rules of the United States Supreme Court, I have mailed a true copy of the foregoing pleading by depositing same in a United States post office mailbox, first class, postage pre-paid, or hand delivering same to the following, this _____ day of October, 1982:

C. Michael Montgomery, Seawell, Dalton, Hughes & Timms, Post Office Box 119, Norfolk, Virginia 23501, Counsel for Johns-Manville Corporation and Johns-Manville Sales Corporation; William V. Hoyle, Esquire, Hoyle, Corbett, Hubbard, Smith & Payne, 11048 Warwick Boulevard, Suite 201, Newport News, Virginia 23601, Counsel for Raybestos-Manhatten, Inc.; William B. Eley, Esquire, Willcox, Savage, Dickson, Hollis & Eley. P.C., Post Office Box 3686, Norfolk, Virginia 23514, Counsel for Eagle-Picher Industries, Inc.; Gerard E. W. Voyer, Esquire, Taylor, Walker & Adams, Post Office Box 3530, Norfolk, Virginia 23514, Counsel for Unarco Industries, Inc.; Stuart Bateman, Esquire, 11048 Warwick Boulevard, Newport News, Virginia 23601, Counsel for Fibreboard Corporation; Archibald Wallace, III, Esquire, Sands, Anderson, Marks & Miller, Post Office Box 1998, Richmond, Virginia 23216, Counsel for H. K. Porter Company; John Y. Pearson, Jr., Esquire, Willcox, Savage, Dickson, Hollis & Eley, P.C., 1800 Virginia National Bank Building, Norfolk, Virginia 23510, Counsel for The Celotex Corporation; Henry C. Morgan, Jr., Esquire, Pender & Coward, Post Office Box 12027, Norfolk, Virginia 23502, Counsel for Keene Corporation; Richard S. Glasser, Esquire, Glasser and Glasser, 504 Plaza One Building, Norfolk, Virginia 23510, Counsel for Amicus below; Robert R. Hatten, Esquire, Patten & Wornom, 14749 Warwick Boulevard, Newport News, Virginia 23602, Counsel for Amicus below; Solicitor General, Department of Justice, Washington, D.C. 20530, Counsel for United States of America, Amicus below.

Linda S. Laibstain

LIAISON NOTICE

AUG 30 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK AND NEWPORT NEWS DIVISIONS

By _____ Deputy Clerk

IN RE: ASBESTOS CASES — C/P 77-1

NANCY COOK ROBERTSON, EXECUTRIX OF THE ESTATE OF JAMES H. ROBERTSON, DECEASED, and JOHN C. LUMPKIN, ADMINISTRATOR OF THE ESTATE OF GEORGE HENRY RIDDICK, DECEASED,

Plaintiffs,

vs.

JOHNS-MANVILLE CORP., et al

Defendants.

Civil Action No. 77-601-N

Civil Action No. 79-215-N

LIAISON NOTICE
No # 900
Date Rec'd 9/3/82
Date Mailed 9/3/82

THOMAS HOGGE, DONAHUE ELLIS, WILSON JONES, and JESSE JAMES,

Plaintiffs,

vs.

JOHNS-MANVILLE CORP., et al

Defendants.

Civil Action No. 82-23-NN
(Formerly Civil Action Nos. 76-178-NN and 79-59-N

JESSIE WELLS and JAMES VESS,

Plaintiffs,

vs.

JOHNS-MANVILLE CORP., et al

Defendants.

Civil Action Nos. 80-691-N and 80-693-N

ORDER

THIS DAY appeared the Plaintiffs, by counsel, and pursua to Rule 21 of the Federal Rules of Civil Procedure, moved to sever their respective claims against Johns-Manville Corp. and Johns-Manville Sales Corp.

It appearing to the Court that Johns-Manville Corp. and Johns-Manville Sales Corp. have filed a voluntary petition for reorganization under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York in New York, New York, and that the above-styled cases should continue to proceed in this Court against the other Defendants in order to avoid delay, prejudice and inconvenience, it is hereby ORDERED for good cause shown that th Plaintiffs' claims against Johns-Manville Corp. and Johns-Manvil Sales Corp. in the above-styled matters be and hereby are severed pursuant to Rule 21 of the Federal Rules of Civil Procedure, and that the Plaintiffs' claims against the other Defendants herein shall continue to proceed, separately, in thi Court. ~~It is further ORDERED that this Order be entered nun pro tunc as of August 25, 1982.~~

ENTERED this 30 day of August, 1982.

United States District Judge

I ASK FOR THIS:

Of Counsel for Plaintiffs

HAVE SEEN: ~~objected to~~:

Of Counsel for Eagle-Picher Industries, Inc.

Of Counsel for H. K. Porter Co. and Southern Textile Corporation

Of Counsel for Pittsburgh Corning Corporation

Of Counsel for Raybestos-Manhattan, Inc.

Of Counsel for The Celotex Corporation

"Exhibit "A"

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-1379

Greitzer & Locks, Gene Locks and Martin Greitzer; Neil R. Peterson,

Appellants,

v.

Johns-Manville Corporation and Johns-Manville Sales Corporation; Raybestos-Manhatten, Inc; Eagle-Picher Industries, Inc.; Unarco Industries, Inc.; Fibreboard Corporation; H. K. Porter Company; Southern Textile Corporation; Pittsburgh Corning Corporation; The Celotex Corporation; Keene Corporation,

Appellees,

United States of America,

Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Virginia at Norfolk and Newport News. J. Calvitt Clarke, Jr., District Judge.

Argued: October 5, 1981 Decided: March 5, 1982

Before WIDENER, MURNAGHAN and CHAPMAN, Circuit Judges

Robert C. Nusbaum (Hofheimer, Nusbaum, McPhaul & Brenner on brief) for Appellants; C. Michael Montgomery (C. Grigsby Scifres, Seawell, Dalton, Hughes & Timms; William V. Hoyle, Charles A. Smith, Philip S. Payne, Hoyle, Corbett, Hubbard, Smith & Payne; William B. Eley, Eley, Rutherford & Leafe; Gerard E. W. Voyer, Taylor, Walker & Adams; Stuart Bateman; Archibald Wallace, III, Albert D. Bugg, Jr., Sands, Anderson, Marks & Miller; Worth Banner, Reynolds, Smith & Winters; John Spindle; Henry C. Morgan, Jr., Pender, Coward, Addison & Morgan on brief) for Appellees; (Richard S. Glasser, Glasser and Glasser; Robert R. Hatten, Patten and Wornom on brief) as Amicus Curiae for Virginia Asbestos Plaintiffs (Stuart E. Schiffer, Acting Assistant Attorney General, Justin W. Williams, United States Attorney, Robert E. Kopp, John F. Cordes, Civil Division, Department of Justice on brief) as Amicus Curiae for United States.

CHAPMAN, Circuit Judge:

This appeal is from orders disqualifying the law firm of Greitzer & Locks from participation in approximately 77 Virginia asbestosis cases in which it serves as counsel. The three judges of the Norfolk and Newport News Divisions of the Eastern District of Virginia, sitting en banc, disqualified the law firm from participation in all asbestosis cases filed in Virginia because the firm employed Neil R. Peterson, who until his employment with Greitzer & Locks had been the Justice Department litigator charged with defending the United States in the Virginia asbestosis cases.

Greitzer & Locks is a six person firm located in Philadelphia, Pennsylvania. Peterson joined the firm in October of 1980 as the sixth attorney and fourth associate at the firm. In addition to the Virginia asbestosis litigation, the firm participates in approximately 1200 other asbestosis cases nationwide. Appellees (hereafter "manufacturers") manufacture and distribute products containing asbestos.

On April 23, 1981 the so-called Norfolk asbestosis litigation involved 333 individual plaintiffs. This litigation comprised essentially all of the asbestosis litigation pending in Virginia. The United States was a party to claims of 246 of the individual plaintiffs' claims. These 246 individual claims comprised 77 separate civil actions. Greitzer & Locks served as co-counsel, representing 223 plaintiffs in 67 of these

civil actions. Greitzer & Locks represented a total of 260 plaintiffs in the Norfolk litigation, whose claims comprised 77 separate civil actions.

Since this circuit follows the rule permitting appeal of orders granting motions to disqualify counsel pursuant to the "collateral order" exception to the finality requirement of 28 U.S.C. §1291, Aetna Casualty & Surety Co. v. United States, 570 F.2d 1197, 1200 (4th Cir. 1978), cert. den. 439 U.S. 821 (1978), jurisdiction of this appeal is pursuant to §1291. The question of appealability of orders disqualifying counsel was expressly reserved in the Supreme Court's recent ruling in Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981). Since this opinion expressly reserved the question of appealability of orders disqualifying counsel, Aetna Casualty & Surety Co., supra, is still binding authority in this circuit.

There is no question that Peterson is disqualified from participation in the Virginia asbestosis cases. The fact of his personal disqualification was recognized in advance of the motion for disqualification by Peterson, the government and Greitzer & Locks, who all agreed that Peterson was to be screened from participation in the Virginia cases. This appeal concerns whether Greitzer & Locks should be disqualified from continued participation in the Virginia asbestosis cases despite the firm's efforts to screen Peterson from participation in any asbestosis cases in which the United States is a direct defendant and from all asbestosis cases in Virginia.

Our scope of review in this matter is not limited to abuse of discretion as appellees contend. In disqualification cases where the facts are not in dispute, as they are not here, it is appropriate for the appellate court "to determine whether the District Court's disqualification order was predicated upon a proper understanding of the applicable ethical principles." Woods v. Covington Cty. Bank, 537 F.2d 804, 810 (5th Cir. 1978); Aetna Casualty & Surety Co., supra at 1200. It is our opinion that the district court erred in concluding that the screen approved by the government would not be sufficient to protect the government from inadvertent disclosure of confidences and trial secrets Peterson may have learned while with the government.

In 1977 Peterson was employed as special litigation counsel in the Civil Division of the Department of Justice, where his duties were "to be generally involved with the coordination of the defense of asbestos litigation against the United States, and to personally undertake the defense of one major group of asbestos cases, the . . . Norfolk cases." Peterson's principal duty from September 1977 until October 1980 was to act as counsel for the United States Navy in the Norfolk litigation. During this same period, Peterson provided strategy for the defense of the United States in asbestosis litigation generally.

In January of 1980, Peterson began looking for a position with a private firm. Sometime in July of 1980, Gene Locks of Greitzer & Locks heard that Peterson was looking for private employment and contacted Peterson about employment with Greitzer & Locks. In August of 1980, Peterson consulted the Office of Legal Counsel of the Justice Department about his employment with Greitzer & Locks. There he was advised that the Ethics in Government Act prohibited his participation in the Norfolk cases. He was also advised that if he went with Greitzer & Locks, he would have to be screened from the firm's participation in these cases. Greitzer & Locks agreed to these limitations.

On September 10, 1980, Peterson formally advised the Civil Division of the Justice Department that he planned to participate in asbestosis litigation upon his association with Greitzer & Locks. Peterson noted his "understanding" with Greitzer & Locks that he would not participate in the Norfolk cases and certain other cases in which he participated while in government. Peterson provided the Department with proposed "shielding" provisions and asked it to indicate that it "would have no objection to the firm of Greitzer & Locks continuing to participate in current litigation, particularly that in Norfolk and Newport News, Virginia . . . provided the firm complies with . . . 'shielding' provisions . . . ." The specified shielding provisions prohibited Peterson from working, advising,

or participating, indirectly, by discovery, analysis or otherwise, in the Virginia cases. He was to be denied access to the files and prohibited from sharing in profits derived from the Virginia cases.

The Civil Division was not able to finalize a recommendation for Peterson by the end of September. Peterson was therefore asked to submit a memorandum projecting his first month's duties with Greitzer & Locks. Peterson submitted this memorandum on September 30, 1980, and he left the Department of Justice effective October 3, 1980.

The Civil Division solicited its client agencies' views on Peterson's waiver request. The Department of Health and Human Services and the Department of Labor expressed reservations about Peterson working for Greitzer & Locks, specifically noting Peterson's access to government asbestosis files and knowledge of government litigation strategy. The Navy, the client agency in the Virginia litigation, did not object to waiver of Greitzer & Locks' participation in these cases, but it did reserve its objection to the firm's participation in other cases. The Office of Legal Counsel noted that Peterson should be screened from all cases involving his client agencies, not just those in Virginia.

The Justice Department had not acted on the proposed screening arrangement by November 26, 1980, the date the manufacturer filed their motion to disqualify Greitzer & Locks from participation

in the Virginia cases. Counsel for Peterson met with the Justice Department in early January. In response to concern about Peterson's participation in any asbestosis actions against the United States, Peterson submitted a revised proposal in which he was to be screened from all asbestosis actions in which the United States was a direct defendant. In addition, in those cases in which the United States was or might become a third-party defendant, Peterson's participation was to be confined to those aspects of the plaintiffs' cases against the direct defendants. Peterson was also to be barred from taking discovery from the United States or from deposing or cross-examining any government witness. The Justice Department, on January 8, 1981, wrote Peterson, informing him that the Civil Division and all client agencies had waived "imputed disqualification" of Greitzer & Locks from the Virginia asbestosis litigation, provided Peterson and Greitzer & Locks abided by the screening arrangements.

The merits of the appeal focus on two disciplinary rules in the ABA Code of Professional Responsibility. The first is D.R. 9-101(B), which reads as follows, "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." The second disciplinary rule is D.R. 5-105(D), which reads as follows,

"If a lawyer is required to decline employment or to withdraw from employment under a disciplinary rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

A literal interpretation of D.R. 5-105(D) would require widespread disqualification of firms employing former government attorneys. The American Bar Association, however, does not interpret D.R. 5-105(D) to mandate law firm disqualification whenever employment of a government attorney results in a firm conflict of interest. In Formal Opinion 342 the ABA Ethics Committee takes the position that disqualification of the firm may not be necessary if the disqualified lawyer has been properly screened from participation in the case and there is "no appearance of significant impropriety affecting the interests of the government." 62 A.B.A.J. 517, 521 (1976).

Other appellate courts have followed the ABA's lead and rejected a literal interpretation of D.R. 5-105(D) when the disqualified government attorney is properly screened. Woods v. Covington Cty. Bank, supra at 812-13; Armstrong v. McAlpin, 625 F.2d 433, 445 (2nd Cir. 1980) (en banc), vacated on other grounds, 449 U.S. 1106 (1981). This court has expressed dissatisfaction with automatic, mechanical applications of the Code of Professional Responsibility. Aetna Casualty & Surety Co. v. United States, supra at 1202. We now rule that, when appropriate, the intrafirm screen is an acceptable alternative to automatic disqualification of a law firm hiring a former government attorney.

The plaintiffs and the Justice Department (on brief as amicus curiae) argue that the district court erred in rejecting the screening arrangement between Peterson and the other attorneys in Greitzer & Locks since the screen had been approved by the government. In Formal Opinion 342 the ABA Ethics Committee takes the position that the government may waive disqualification of the firm "whenever the government agency is satisfied that the screening measures will effectively isolate the individual lawyer from participating in the particular matter and sharing in the fees attributable to it, and that there is no appearance of significant impropriety affecting the interests of the government . . . ."[1] 62 A.B.A.J., supra. We are satisfied that the affected client agencies of the government are often the best judges of the suitability of screens erected to protect them from disclosure of confidences and secrets. For this reason, the government's waiver of imputed disqualification of a law firm is entitled to substantial deference. Formal Opinion 342, supra; ABA Proposed Final Draft of the Model Rules of Professional Conduct, Rule 11.1 (May 31, 1981).

Notwithstanding the deference to be afforded a governmental waiver of imputed disqualification, the courts have an independent

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[1] Formal Opinion 342 also provides that governmental waiver of imputed disqualification does not relieve the affected law firm from undertaking its own independent evaluation of the screening arrangement.

participation of an otherwise disqualified law firm. See Kesselhaut v. United States, 555 F.2d 791 (Ct.Cl. 1977) (en banc) (per curiam); Accord, Hull v. Celanese Corporation, 513 F.2d 568 (2nd Cir. 1975); Ethical Problems for the Law Firm of a Former Government Attorney: Firm or Individual Disqualification, 1977 Duke L.J. 512, 520-21, 528.

The district court concluded that the intrafirm screen approved by the government would not effectively shield the government from accidental disclosure of confidences and trial strategy known by Peterson. The court noted that Peterson would be participating in the trial or settlement of approximately one thousand asbestosis cases. It reasoned that these cases would take a considerable amount of time to litigate and that the small size of Greitzer & Locks and the prolonged nature of asbestosis litigation would make inadvertent disclosures inevitable. In disqualifying Greitzer & Locks the court also relied on the possibility that Peterson had already passed confidential information to other members of the law firm. This possibility of past disclosure was based on the fact that during October, November and December of 1980 Greitzer & Locks operated under the assumption that Peterson was only to be barred from participation in the Virginia cases. The court reasoned that there was a real possibility Peterson had inadvertently disclosed confidential information while free to work on non-Virginia asbestosis cases involving the United States. Finally, the court concluded that

Greitzer & Locks' unique caseload made it impossible to screen Peterson from participation in profits from all cases in which the United States was a direct defendant.

The district court was correctly concerned that the small size of Greitzer & Locks, when considered in terms of the firm's caseload (1200 asbestosis cases nationwide), would work against effectiveness of the screen. The court was also correct to be concerned about the possibility of inadvertent disclosure from the time Peterson went to work for Greitzer & Locks until the time the government approved the screen precluding Peterson's participation in any cases against the United States.[2] See note, the Chinese Wall Defense to Law-Firm Disqualification, 128 U.Pa.L.Rev. 650, 712-13 (1980).

Doubts about the size of a firm and timely implementation of the screen may sometimes be sufficient to reject a screening arrangement. Cheng v. GAF Corporation, 631 F.2d 1052,1058 (2nd Cir. 1980), vacated on other grounds, 101 S.Ct. 1338 (1981).

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[2] While we agree that it is necessary to screen Peterson from financial participation in the Virginia cases and other cases in which the United States is a direct defendant, we do not agree with the district court that it is impossible for Greitzer & Locks to screen Peterson from direct financial participation in these cases. The indirect benefits that might accrue to Peterson do not make the screen unacceptable when Greitzer & Locks makes every effort to screen him from direct financial participation in these cases.

On the other hand, when the government has waived imputed disqualification of a firm, there is a strong probability that there has been a knowing waiver of disqualification and that the government is willing to bear the risk of inadvertent disclosures. We believe, therefore, once imputed disqualification has been waived, a possibility of inadvertent disclosure based on the size of a firm and its relative caseload is not a sufficient reason for rejecting a screening arrangement such as that in this case.

As noted in Aetna Casualty & Surety Co. v. United States, supra, we are concerned with "how real in the practical world [asserted ethical problems] are in fact." In this case the district court merely speculated that opportunities for inadvertent disclosures would arise without analyzing the specific situation in which the disclosures were to take place.[3]

Peterson will be participating in the non-Virginia asbestosis actions against the manufacturers with other attorneys at Greitzer & Locks. Other attorneys will be participating in asbestosis actions directly against the United States. Both the direct actions against the manufacturers (on which Peterson and other attorneys at Greitzer & Locks will be working) and the direct actions against the United States (on which Peterson's co-attorneys will be working)

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[3] While we rule that the district court's finding of a possibility of inadvertent disclosure is too speculative, this opinion is not a ruling on the minimum showing that will be sufficient to overcome a governmental waiver of imputed disqualification.

appear to be proceeding on the same theories of liability -- negligent failure to warn, implied warranty, and strict tort. If the manufacturer's liability is so intimately related to actions by the government, that Peterson and the other attorneys at Greitzer & Locks cannot work together on the actions against the manufacturers without Peterson disclosing confidences that would taint the Virginia plaintiffs' direct claims against the government, then disqualification of Greitzer & Locks from the Virginia plaintiffs' direct actions against the United States would be justified.

We are unsure, after considering the present record and the district court's conclusions based on a comparison of the size of Greitzer & Locks and its caseload, whether such a danger in fact exists. One circumstance making such a ruling less likely is the fact that Peterson will only be participating in non-Virginia asbestosis actions, which will of necessity arise in a different location than the Virginia actions, and thus be less factually similar to the actions in Virginia.[4] The less similar the actions, the more likely it is that Peterson and the other attorneys at Greitzer & Locks can work together on the non-Virginia actions without risking disclosure.

Based on the foregoing, we believe that the district court failed to show that the continued participation of Greitzer & Locks in the actions directly against the United States presents a

[4] Most Norfolk and Newport News asbestosis cases involving the United States as a named defendant or a third party defendant originate in the construction or repair of Navy ships, which will not be true in many parts of the country where the firm represents asbestosis plaintiffs.

sufficient taint to the underlying trial of those cases so as to reject the government's waiver of imputed disqualification. Accordingly, we vacate the order of the district court disqualifying Greitzer & Locks from these claims.

The district court also disqualified Greitzer & Locks from further participation in the Virginia asbestosis actions directly against the manufacturers. We find that the facts in this case do not justify imposition of this harsh remedy and reverse the district court's action with respect to these cases.

The United States is joined as a third-party defendant in some of the plaintiffs' actions against the manufacturers. When he was employed by the government, Peterson was in an adversarial position to the manufacturers in these cases. Peterson did not participate in the direct defendants' strategy sessions; he did not attend settlement conferences;[5] nor did he undertake joint discovery with the manufacturers.[6] Now that Peterson is with Greitzer & Locks, he continues to be in an adversarial position to the manufacturers, but he is screened from participation in any of the Virginia cases against them.

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[5] In connection with the appeal in Glover v. Johns-Manville Corporation, 662 F.2d 225 (4th Cir. 1981), Peterson was permitted to glance at the breakdown of the manufacturer's contributions to the settlement of the direct action in that case. As noted in the appellate opinion, each contribution was less than $10,000. Id. at

[6] When Peterson was with the government, counsel for plaintiffs and the manufacturers separately interviewed certain government witness Peterson was privy to notes taken during these interviews by counse for both sides.

The district court accepted the manufacturers' contentions that the screen approved by the government would not adequately protect the manufacturers from the possibility of inadvertent disclosure of confidential information. While the district court was unquestionably obligated to carefully scrutinize any evidence of actual prejudice to the manufacturers, one important circumstance distinguishes our analysis of the manufacturers' position from that of the government. Since Peterson and the government were in an attorney-client relationship, the government was entitled to a presumption that Peterson learned confidences and secrets while employed there. E. g., In re Yarn Processing Patent Validity Litigation, 530 F.2d 83, 89 (5th Cir. 1976); Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2nd Cir. 1973). Since there is no attorney-client relationship between Peterson and the manufacturers, they are not entitled to a presumption that Peterson acquired confidential information about them while he was with the government. Fred Weber, Inc. v. Shell Oil Company, 566 F.2d 602, 608 (8th Cir. 1977), cert. den. 436 U.S. 905 (1978).

In the absence of such a presumption and in the face of a governmental waiver of imputed disqualification, we believe that the district court should have had evidence of actual prejudice to the manufacturers before rejecting the screen. We find no such evidence in this record.

The manufacturers direct attention to the fact that Peterson had access to proprietary information about them that had been disclosed to the Navy Bureau of Medicine & Surgery. They also point out that Peterson was privy to notes defense counsel had taken during interviews of government witnesses (see note 5 supra) and that Peterson glanced at a breakdown of the manufacturers' contributions to the Glover settlement (see note 4 supra).

Any specific recollection that Peterson may have of the breakdown in the Glover settlement is not likely to be inadvertentl disclosed. Furthermore, the breakdown in the manufacturers' contributions to the settlement of each case varies according to the relative exposure of each individual plaintiff to each manufacturer's products. Thus, it is unlikely that Peterson gained any material insight by glancing at the settlement breakdow

The manufacturers were also unable to demonstrate that the interview notes or proprietary information contained confidences that would materially prejudice their defense of the Virginia cases. In the absence of such evidence and given the fact that Peterson has been screened from the Virginia cases, we believe that the manufacturers have not demonstrated that Greitzer & Locks should be disqualified from the Virginia asbestosis actions because of Peterson's access to confidential information.

The district court also ruled that Greitzer & Locks should be disqualified from all Virginia asbestosis actions because Peterson's switching sides in the midst of the asbestosis litigati

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[7] Asbestosis litigation is of recent origin and has had explosive growth in the past five years. The number of potential cases can not be determined. To bar Peterson from practicing as a private lawyer in this growing field of law would be unfair, particularly view of the screen protecting his former employer and client.

created an impermissible appearance of impropriety. Intrafirm screens are destined to an uneasy relationship with the mandate of Canon 9 to avoid even the appearance of impropriety. As one commentator has suggested,

> Although broad in scope, that requirement's main thrust is to obligate a lawyer to "promote public confidence" in the American legal system "and in the legal profession." No matter how effective, Chinese walls are not likely to foster public confidence because the details of a law firm's efforts to avoid disqualification will doubtless make but a small impression upon public awareness. (footnotes omitted).

The Chinese Wall Defense, supra at 685. Other appellate courts have recently refused to reject an intrafirm screen solely on the basis of appearance of impropriety. Cf. Woods v. Covington Cty. Bank, supra, (must be "at least a reasonable possibility that some specifically identifiable impropriety did in fact occur") and Armstrong v. McAlpin, supra at 445 ("appearance of impropriety is . . . too slender a reed on which to rest a disqualification order"). We also decline to reject the instant screen solely on the basis of appearance of impropriety.

Accordingly, the order of the district court disqualifying Greitzer & Locks from the Virginia asbestosis actions against the manufacturers is reversed; the order of the district court disqualifying Greitzer & Locks from the asbestosis actions directly against the United States is vacated.

REVERSED IN PART;

VACATED IN PART.

MURNAGHAN, Circuit Judge, dissenting:

I dissent.

As is customary in cases on appeal, we do not approach the problem afresh. We have already the determination not simply of one but of three experienced district judges that fairness will not be served in the conduct of litigation in the United States District Court for the Eastern District of Virginia if the firm of Greitzer & Locks, the employer of Peterson, is permitted to continue to represent a large number of plaintiffs in asbestosis litigation.

Had the case come to us simply in the posture of a timely imposed screen insulating Peterson in advance from contacts productive of conflicts of interest, actual or apparent, I should be more inclined to accept the view of the majority. Even then, however, the reasoned judgment of three district judges would command my respect, and I would not lightly interfere with a decision so intimately concerned with the conduct of affairs in their court.

In any event, however, that is not the situation. Peterson had served for several years as the lawyer in charge of the defenses raised by the United States government, especially

the United States Navy, in asbestos claims arising in or near Norfolk and Newport News, Virginia. A law suit with multiple parties generally involves dividing up into sides. The United States and the manufacturers, as defendants, were on one side. The plaintiffs in many instances represented by Greitzer & Locks were on the other. While, in many respects, the defendants had non-coincidental positions and could be expected to jockey so as to shift liability away from themselves and toward the other defendants, nevertheless, they had an important common purpose, namely, to avoid liability altogether. In terms of appearances, not just to the public but to the bench and bar, it stretches belief unduly not to assume that there was compromise of Peterson as counsel for plaintiff in any asbestosis case arising in Virginia and of any employer which might hire him.

In view of that it was incumbent on Peterson as a prospective employee and especially incumbent upon Greitzer & Locks as a possible employer to take every precautionary step available to them before acting so as to put themselves in a fait accompli situation. Instead they rushed to act without formalizing a satisfactory screen arrangement, and then, having already entered an employment arrangement they sought to speak

in pitiable terms about the hardship to clients and to "poor" Peterson in terms of dislocations which would result from disqualification.

However, the situation was altogether one of Greitzer & Locks' own making. Even though a lawyer has practiced in a specialized area, he has no vested right to make one group of cases a lifetime project, especially where conflicts of interest are palpable and remain, unless and until resolved in advance, inescapable disqualifiers. Peterson must, along his professional path, have obtained trial experience and other lawyer-like attribute enabling him to perform in other areas than purely and solely asbestosis claims. He doubtless was capable of earning a living in other areas. It was obviously a sensitive matter for him to take employment from a firm representing plaintiffs in asbestosis cases in Virgina when he had been working in the same field as a defendant's lawyer for the government.

A self-imposed, unilaterally regulated "screen" leaving just to the employer, Greitzer & Locks, and the employee, Peterson, decisions as to the extent of isolation and degree of monitoring could not conceivably have sufficed. That should have been self-evident to Peterson.

Greitzer & Locks should have been at least as sensitive to the problem as Peterson. Peterson's employment with the government continued until Friday, October 3, 1980. Less than a month before, Peterson asked the Justice Department's consent to a screening arrangement which would permit him to take employment with Greitzer & Locks. There is no evidence of unreasonable delay on the part of the Justice Department in not having an answer to a complicated question involving several government agencies in the short span of twenty-odd days. Peterson essentially immediately after departure from government employment, on October 6, 1980, began providing his services to Greitzer & Locks without having worked out any agreement with his erstwhile employer, the government to satisfy justifiable anxieties and concerns which that immediately previous employer manifestly felt. The behavior of Greitzer & Locks in permitting employment to become effective in such circumstances was simply unprofessional and unacceptable.

Subsequently, a screening process imposing substantial increases in restrictions on Peterson and on Greitzer & Locks was worked out between Peterson and the government, although

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1 October 4, 1980 was a Saturday, and October 5, 1980 was a Sunday.

it was not accomplished until four months later on January 9, 1981.[2] A screening process is an understandable procedure for approaching the tangled and troubled question of potential conflicts on the part of lawyers. It must be recalled, however, that the customary situation arises with respect to one or at most a handful of cases. Most situations do not involve the magnitude of hundreds of separate pieces of litigation such as are here involved.

Furthermore, and most basically, a screening process

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2 In this connection, it is not irrelevant to observe that the waiver of disqualification did not proceed purely and simply from satisfaction on the government's part that it would not be disadvantaged by Peterson's employment by Greitzer & Locks. Rather, it was in large measure a matter of the lesser of two evils. In the case of two evils, one does not cease to be an evil just because it is accepted by the person faced with the choice, in order to avoid a greater evil. The government was concerned that, in the future, in other cases, involving other parties, it might encounter difficulty in obtaining desired employees who might be disinclined to work for the government if that meant that they would subsequently have to forego other employment. Yet the reasons for rules requiring such foregoing of attractive employment possibilities stemmed from other sources besides simply an employer such as the Department of Justice or the United States Navy. They have to do with the question which is core central here, namely, the insurance of fairness and unquestioned impartiality, without undue advantage, in the administration of justice. The manufacturer defendants, while naturally doubts arise as to their motivations in seeking disqualification of opposing lead counsel in a large number of cases, are, nevertheless, entitled to a judicial atmosphere uncontaminated by the ineradicable grounds for suspicion which Greitzer & Locks and Peterson have created by their behavior in the present case.

depends on the unquestioned integrity of those whose undertakings totally to disassociate themselves from certain aspects of specific litigation, or from conduct of affairs of their law firms in some areas, must be worthy of unquestioned belief.[3] Greitzer & Locks and Peterson did not come before the district court entitled to such implicit faith in their words. They tarnished their reputation for reliability and dependability by their actions in October 1980 when Peterson was hired by Greitzer & Locks in circumstances of "just trust me, you've nothing to worry about."[4] The district court acted in its discretion in losing faith. It, therefore,

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3 "It is the possibility of the breach of confidence, not the fact of the breach, that triggers disqualification." Trane v. Smith, 621 F.2d 994, 999 (9th Cir. 1980).

4 The district court noted:

> (2) Peterson accepted employment with the law firm and went to work with the firm before any agreement was worked out between the Government and the firm.
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> (3) Peterson worked with the firm for three months before waiver agreement was worked out.

J.A. at 595.

> This hardship quite properly rests with the firm which knowingly undertook the employment of an individual in the face of the Code's clear prohibition, without first securing a Government waiver and seeking approval of the screening procedures from this Court.

J.A. at 598.

acted in its discretion in finding that a screen, the success of which depended on persons who were not dependable, was not sufficient to the purpose.

Appellants make much of the supposed regrettable imposition suffered by the clients in the hundreds of asbestosis cases here involved. Quite apart from the consideration that, whichever way our decision may turn, some clients are going to be injured, and independently of the fact that Greitzer & Locks brought it on themselves and on their clients, I venture the observation that the client loss through disassociation from Greitzer & Locks may not be as severe as pictured by that interested party.

In the first place, it is to me a matter of some concern that, as the record reveals, Greitzer & Locks established a uniform policy, presumably for the approximately 1500 cases in which it represents the plaintiffs, of demanding a contingent fee amounting to 40% of the gross recovery, as well as all costs incident to the services provided, unless there were an appeal, in which case the compensation would increase to 45%. The justification for such large percentages in contingent fee situations derives from the risk that the plaintiff may lose and that his or her counsel, therefore, may have expended substantial effort yet have gone

entirely uncompensated. The validity of that assumption is strong when one considers a single case. However, its reliability as a foundation essentially dissipates as the number of cases increases and the virtual certainty of recovery in many of them increases with it. That Greitzer & Locks itself should not have moved on its own to ameliorate what appears to me a very questionable overall fee arrangement suggests a mercenary approach inconsistent with the duty of fair representation. While plaintiffs may lose a little in time in securing new representation, their likelihood of benefitting in the end is at least as great as the hypothetical loss from having Greitzer & Locks disqualified as their representatives.

Along the same lines consider the awkwardness of the approach taken by Greitzer & Locks to the present appeal. The firm did not, as far as the record discloses, even consult a single client as to whether the appeal should be lodged. The appeals were simply filed in the name of the law firm itself. The indication again is strong that the lawyers' welfare took precedence in the minds of Greitzer & Locks over the welfare and interest of the clients. We have made no point of the possible lack of jurisdiction deriving from the want of a proper party appellant. Generally the rules are applied very liberally so as

not to cost a party his day in court. Nevertheless, the contention was vigorously advanced by appellees, yet could have been eliminated in advance by the simple expedient of obtaining the consent of at least one and perhaps several appellants. That indicates a lack of that thoroughness which we generally associate with first-rate counsel.

Greitzer & Locks put forward as an extenuation the consideration that, with the number of its asbestosis clients well in excess of 1000, it would impose an impossible burden to require it to obtain authorizations to appeal from each plaintiff. However, that argument is not available in the usual case involving only one or at most a handful of would-be appellants, and it really boils down, therefore, to a clear demonstration that, by undertaking representation of such a large number of parties, Greitzer & Locks confessedly has given and has been content to give to each plaintiff less thorough representation than if it had restricted the number of representations it sought to undertake in the same area.

This is not an entirely trivial observation. The case belongs to the client, not to the lawyer. It is not beyond the realm of possibility that one or more individual plaintiffs, had they been asked and fully informed of their alternatives, as

they were entitled to expect, might have decided that they wished to take advantage of the existence of the disqualification order in the district court to substitute other counsel more qualified, in the minds of the plaintiffs at least, to present their case in the strongest most effective fashion.

Accordingly, I would affirm the decision promulgated by the three district judges.[5]

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5 It will, perhaps, not go unobserved that I have omitted referring to the American Bar Association's Code of Professional Responsibility as a source of support for my conclusion. The ABA Code is but one set of moral standards, albeit one worthy of close attention and not lacking in persuasive authority. The point is that the result arrived at by the district court should be affirmed even had no ABA Code existed.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GREITZER & LOCKS, et al.,

Petitioners,

v.

JOHNS-MANVILLE CORPORATION, et al.,

Respondents

RE: PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

REPLY OF JOHNS-MANVILLE CORPORATION AND JOHNS-MANVILLE SALES SALES CORPORATION TO RESPONSE OF PETITIONERS TO MOTION TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI DURING PENDENCY OF AUTOMATIC STAY UNDER 11 U.S.C. §362(a)(1)

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INTRODUCTION

Since 1976 hundreds of plaintiffs have filed suits against Johns-Manville Corporation and Johns-Manville Sales Corporation (hereinafter Johns-Manville) in the United States District Court for the Eastern District of Virginia. As of October, 1980, over two hundred of these plaintiffs were being represented by the Philadelphia firm of Greitzer and Locks. The great majority of these cases involved construction and repair of Naval vessels at both public and private shipyards. Greitzer and Locks, in addition to the Virginia cases, represented more than eight hundred plaintiffs outside Virginia, many of whom also worked in shipyards.

The United States government, for many years, has also been involved in the asbestos litigation. The General Services Administration (GSA), the Department of Health and Human Services (HHS), the Labor Department, and the Navy were at least four governmental branches that had either direct or indirect involvement. Their chief lawyer was Neil R. Peterson.

The Navy was alleged by defendants in shipyard cases to be the proximate or intervening cause of plaintiffs' alleged injuries, and much discovery was conducted of the Navy in this regard. The Navy's chief attorney in this discovery effort was Neil R. Peterson.

The Navy was sued in Virginia in both public and private shipyard cases for contribution or indemnity. The Navy's chief attorney was Neil R. Peterson.

The United States government had proprietary information concerning defendants which was withheld by the government from the eyes of Greitzer and Locks when they attempted to discover the same. The information was withheld from Greitzer and Locks by the staff attorneys working under Neil R. Peterson.

Defendants in the Virginia litigation entered into a settlement agreement among themselves, which, by court order, Greitzer and Locks was forbidden to see. This agreement was seen, however, by Neil R. Peterson.

Defendants in Virginia conducted informal interviews of government employees. Greitzer and Locks were not allowed to be present. Mr. Peterson's staff attorneys were, on condition that the discussions be kept confidential by the government. The government staff attorneys discussed these interviews with their boss, Neil R. Peterson.

In October, 1980, Neil R. Peterson joined the law firm of Greitzer and Locks. Johns-Manville and certain other defendants, in the cases filed against them by Greitzer and Locks, filed a Motion to Disqualify Peterson and Greitzer and Locks from further participation in such cases. All three active status United States District Judges who regularly sit in Norfolk, and who had all presided at asbestos related trials, unanimously granted the Motion to Disqualify, after a full evidentiary hearing. The Fourth Circuit Court of Appeals, en banc, affirmed.

On August 26, 1982, Johns-Manville, the target defendant of Greitzer and Locks in the Virginia cases in which the Motion to Disqualify arose, filed with the United States Bankruptcy Court for the Southern District of New York for reorganization under Chapter 11 of the Bankruptcy Act, 11 U.S.C. § 1 et seq. Section 362(a)(1) of the Act states:

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities of
>
> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title . . . (Emphasis added.)

The Restraining Order entered by the Bankruptcy Court affirms this automatic stay.

On September 15, 1982, in contemptuous disregard of the above statute of the United States and the Order of the Bankruptcy Court, and without seeking any relief from the stay, although there are statutory avenues available, Greitzer and Locks filed its Petition for Writ of Certiorari in this Court. Johns-Manville has moved to defer consideration

of the Petition during the pendency of the automatic stay. Greitzer and Locks have filed a response, and this is a reply thereto.[1]

ARGUMENT

Petitioners' response to the Motion of Johns-Manville to Defer Consideration of the Petition, misses the point, begs the question, only addresses the issue at hand tangentially, is generally misleading, and demonstrates once again the refusal of Messrs. Greitzer and Locks to follow appropriate judicial procedure.

The Motion of Johns-Manville to Disqualify Greitzer and Locks and Neil R. Peterson was filed in, arose out of, and pertains directly to, over two hundred plaintiffs' actions filed by Greitzer and Locks against Johns-Manville. For Greitzer and Locks to now come into this High Court and suggest that their Petition does not relate to a matter filed against Johns-Manville, is ludicrous. Nor can Greitzer and Locks suggest that their Petition does not relate to a matter affecting the bankrupt's estate. Johns-Manville moved for disqualification because of the adverse and prejudicial impact that the hiring of Neil R. Peterson had on the millions of dollars in claims filed by Greitzer and Locks against Johns-Manville. No determination has been made as to how these claims will now be resolved but certainly, until such determination is made, it cannot be presumed, nor supported by any rational process, that the prejudice does not still exist. Because the instant disqualification matter is inextricably a part of cases filed against Johns-Manville, and has a direct effect upon claims against the bankrupt estate, it was automatically stayed by the provisions of 11 U.S.C. §362(a)(1) on August 26, 1982.

In view of the automatic stay, the Petition for Writ of Certiorari should never have been filed unless and until Greitzer and Locks applied for and obtained from the Bankruptcy Court, under 11 U.S.C.§362(d) or (f), appropriate relief from the stay. However, such relief was never sought,

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[1] In the event Johns-Manville's Motion to Defer is denied, Johns-Manville adopts and incorporates as its Response to the Petition for Writ of Certiorari, the Response filed by H. K. Porter Company, Inc., et al.

because, we must assume, Greitzer and Locks feared that following the proper procedure would have resulted in a refusal by the Bankruptcy Court to lift the stay. Instead, Greitzer and Locks once again have ignored proper and appropriate procedures, and have tried to bully their way past them. This is indicative of the same pattern of disregard of judicial and statutory rules which resulted in their disqualification in the first instance. Their bullying tactics should not be allowed to succeed.

This matter was automatically stayed on August 26, 1982, and accordingly, the Motion of Johns-Manville to Defer Consideration is appropriate. Deferral will not result in any prejudice to plaintiffs. The lower court in its Order of Disqualification made ample provision for co-counsel for plaintiffs to have extra time to prepare for trial. These co-counsel or "young lawyers," as they are referred to by Petitioners, who have been associated from the beginning with Greitzer and Locks in the Virginia cases, and who have actively represented plaintiffs vigorously for six years, are 40 and 34 years old respectively, and just two months ago extracted a verdict of $829,000 in favor of four plaintiffs.[2]

Greitzer and Locks have been held by a unanimous three Judge panel of the District Court, and by five Circuit Court Judges, to have violated the Canons of Professional Responsibility and, in so doing, to have threatened the integrity of the litigation which they had filed against Johns-Manville. Now, after Johns-Manville, in financial peril, takes appropriate steps under the Bankruptcy statutes to protect itself against financial disaster, Greitzer and Locks contemporaneously ignores those same statutes, and attempts to have this Court review a Petition for Writ of Certiorari, which review would strip Johns-Manville of the very protection that is contemplated by the statutes.

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[2] Petitioners argue that the first trial of these cases, with Greitzer and Locks present, resulted in higher verdicts. While this is true, it also resulted in the entry of Judgment N.O.V. in favor of the defendants for numerous reasons, including the fact that the verdict was speculative as a matter of law.

Petitioners should not be allowed to circumnavigate a statutory mandate, simply by ignoring it, especially when that very same statute affords Petitioners the right to apply for a lifting of the stay should they so desire. The Motion of Johns-Manville to Defer Consideration of the Petition for Writ of Certiorari During the Pendency of the Automatic Stay should be granted.

Petitioners, demonstrating the weakness of their first argument, submit that, if this Court is not inclined to deny the Motion to Defer so long as Johns-Manville remains a party, Johns-Manville should be severed. This additional strategy of Petitioners (predicted by Johns-Manville in its Motion to Defer) should also be thwarted, for several reasons. First, Petitioners cite no rule or statute, and offer no authority for the severance, other than to refer obtusely to a decision of the trial court to sever Johns-Manville and Unarco (which also has filed for reorganization under the Bankruptcy Act) which ruling is itself the subject of an appeal to the Fourth Circuit. Second, Johns-Manville has taken the lead in this fight, its rights and the status of plaintiffs' claims against it are greatly affected by this case, and to refuse to defer consideration until Johns-Manville can participate would be either (1) to unalterably affect its substantive rights without it being represented, or (2) to force it to waive its statutory protection under the automatic stay provisions of 11 U.S.C. §362(a)(1), and suffer the expense and effort to defend its position in matters arising out of claims filed against it prior to its filing for reorganization. Third, Petitioners could have acted appropriately, and sought relief from the Bankruptcy Court, or a severance, <u>before</u> filing the Petition for Writ of Certiorari. However, true to form, Petitioners blatently ignored theses proper avenues of redress. Accordingly, Petitioners' effort to sever Johns-Manville under these circumstances, and at this late and improper date, should be denied.

CONCLUSION

The Motion of Johns-Manville to Defer Consideration of the Petition for Writ of Certiorari During the Pendency of the Automatic Stay under 11 U.S.C. §362(a)(1), should be granted.

JOHNS-MANVILLE CORPORATION AND
JOHNS-MANVILLE SALES CORPORATION

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CERTIFICATE

This is to certify that pursuant to Rule 28.5(b), Rules of the United States Supreme Court, I have mailed a true copy of the foregoing pleading by depositing same in a United States post office mailbox, first calss, postage pre-paid, or hand delivering same to the following, this 14th day of October, 1982:

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C. Michael Montgomery